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v. 2996

(Testimony of Edward G. Bradley.)

Q. How long have you been in Government employ? [578] A. Since May of 1934.

Q. Has your service been continuous since that date? A. It has.

Q. What was your assignment in the months of February and April, of 1951?

A. In February and April of 1951 I was chief of the Compliance Section, Surplus Property Utilization Division.

Q. In what agency?

A. In the department—in the Federal Security Agency.

Q. And the Federal Security Agency's functions were later assumed by the Department of Health, Education and Welfare, were they?

A. That is right.

Q. Did you have a meeting or a series of meetings with Mr. George Finn in the months of February, March or April, of 1951?

A. I had a series of meetings with Mr. Finn during the early part of April, in 1951.

Q. Do you recall the date of the first of such meetings?

A. I do not recall the exact date. My recollection is that it was in the early part of '51, the early part of April, 1951.

Q. Do you recall the place of that first meeting?

A. The meeting took place in my office. [579]

Q. Which is located where, sir?

A. Which is located in Washington, D. C., Fourth and C Street Southwest.

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(Testimony of Edward G. Bradley.)

Q. Is that the Federal Security Building?

A. That was the Federal Security Agency Building.

Q. Was anyone else present at that first meeting besides yourself and Mr. George Finn?

A. No, sir.

Q. Will you state the substance of the conversation between Mr. Finn and yourself on that occasion?

A. Mr. Finn stated that he had been to the Civil Aeronautics Administration to register, to apply for registration for an aircraft, and he said that the C.A.A., or Civil Aeronautics Administration had referred him to the Federal Security Agency for a bill of sale which would remove the restrictions that applied on the aircraft that he had in mind. It was an aircraft that had been previously transferred by War Assets Administration for educational purposes.

Q. Did he identify that aircraft any further than in the manner you have just described?

A. Well, he showed me some pictures of an aircraft.

Mr. Abbott: May it please the court, in the course of defendant George Finn's testimony he stated he would undertake to supply the pictures in question if they were available; said he would bring them to court. May I inquire if they are [580] here?

Mr. George C. Finn: Did I say I would do that? Well, I certainly will if I can find them. I have

(Testimony of Edward G. Bradley.)

gone through a picture file, but not looking for these. But I went through one of our picture files. But I didn't see any pictures in there. But if I can find them, I will bring them.

Q. (By Mr. Abbott): Will you describe, generally, Mr. Bradley, what was portrayed by the pictures shown to you by Mr. Finn in that first conversation?

A. The pictures portrayed an airplane in very poor condition. As I recall it, there were no motors. The instrument panel had been stripped. And, oh, the tail was bent and it looked like—well the aircraft was in very bad shape.

Q. Now, just what did Mr. Finn say to you at the time that he showed you those pictures, relating to the pictures themselves?

A. Mr. Finn stated that he had purchased that aircraft from the Vineland School District and had given them some several hundred dollars worth of equipment and hand tools that the school could use; and that he intended to rehabilitate the plane and use it for flight purposes.

Q. Did Mr. Finn, in the course of that conversation or any other conversation with you, mention the purchase of any other aircraft by him from the Vineland Elementary School District? [581]

A. No, he did not.

Q. Did any other person in the course of those conversations make reference to any such purchase of another aircraft, other than the one displayed in the picture?

A. No, sir, not that I know of.

(Testimony of Edward G. Bradley.)

Q. What else was said in the course of that first conversation, Mr. Bradley?

A. Since Mr. Finn wanted to get release of the restrictions in the use of the plane, I felt that I should tell him that the Federal Security Agency at that time had a very definite policy, that it would not release restrictions on any aircraft. That policy was dictated——

The Court: Is this what you told him?

The Witness: Sir?

The Court: Is that what you told Mr. Finn?

The Witness: Yes, sir. That policy was dictated——

The Court: I suggest you preface all your remarks by saying, "I told him."

The Witness: I told him that the policy came about as a result of an agreement between the Department of Defense and the State Department, whereby both of those departments requested the Federal Security Agency to enforce the scrap warranty on educational aircraft. The Department of Defense and the State Department felt that they did not want those planes to be flown and possibly get into the hands of a foreign [582] government whose interest would be hostile to this country.

I also told Mr. Finn that we had an agreement with the Department of Defense at that time, which was concluded sometime in January, whereby any aircraft, any educational aircraft which became either excess to a school's needs or unfit for their particular purpose would be referred to the Depart-

(Testimony of Edward G. Bradley.)

ment of Defense for recapture for use in the Korean War, and that under those circumstances the Federal Security Agency had developed a rather positive policy that it would not grant releases of restrictions, and that I had no authority whatsoever to change that policy.

Q. (By Mr. Abbott): Was anything else said in the course of that first meeting between yourself and Mr. Finn, Mr. Bradley?

A. Mr. Finn, during the course of that meeting, indicated that he would be willing to pay the Federal Government \$2,000 or \$3,000 if he could get a bill of sale. I told him that I could not consider the offer, that the policy laid down by the Administrator's office was hard and fast, and that I had no authority to proceed in the matter.

Q. Did that conclude the conversation, or was something else said?

A. Well, during the first meeting Mr. Finn said he would like to see the agreement form that the school signed. I got the file on the Vineland School and let him look at [583] the Form 65, which was the agreement that the school had signed.

Mr. Abbott: Mr. Clerk, will you please place before the witness Plaintiff's Exhibit 1.

Q. (By Mr. Abbott): Have you had an opportunity to examine Plaintiff's Exhibit 1, Mr. Bradley?

A. I examined this at the time that I had the discussion with Mr. Finn.

(Testimony of Edward G. Bradley.)

Q. Is Plaintiff's Exhibit 1 then the document which you showed to Mr. Finn on that occasion?

A. Yes, it is.

Q. Did you show him that document alone, or did you show that in connection with other papers?

A. Well, I pulled the file on the Vineland School District, and after Mr. Finn read this, then he asked me if he could look at the entire file. I stated I had no objection if he wanted to. And as I recall it there was an empty desk several feet away and I told him he could sit at the desk and look at the file as long as he wanted to, which he did. And I proceeded to go on with other work that I had there.

Q. Mr. Bradley, were you in court when the defendant Vineland showed the 16 mm. picture sound film which is defendant Vineland's Exhibit F?

A. Yes, sir, I was present when that moving picture was exhibited. [584]

Q. Did the aircraft portrayed in that moving picture appear to be the aircraft portrayed in the still photos that were displayed to you by Mr. Finn on the occasion of your first meeting?

A. No, sir. I would say there wouldn't be any resemblance to them. [585]

Q. Would you point out the dissimilarity? What differences were there between the two?

A. The pictures showed to me by Mr. Finn portrayed an aircraft in very bad condition. There were no motors; the instrument panel had been

(Testimony of Edward G. Bradley.)

scrapped, as I recall it. What was left of the plane was damaged, and it was an aircraft in very bad condition.

Q. Did you have a subsequent meeting with Mr. Finn after the meeting you last described?

A. Yes.

Q. How long after the first meeting did that second meeting occur?

A. Well, I would say that that probably took place in maybe two or three days. At that time——

Q. Before going ahead with a description of the meeting, was that meeting in the same place—your office in the Federal Security Agency?

A. Yes, sir.

Q. Was anyone else present?

A. No, there was not.

Q. All right. What was the substance of the conversation, as nearly as you can recall, on that occasion?

A. Well, the substance of that conversation was—in the previous meeting Mr. Finn indicated that he would like to [586] have a photostatic copy of the Form 65, and I told him that was all right, that he could have that if he wished, and in the subsequent meeting Mr. Finn started to discuss with me the conditions on the Form 65, and the conditions that appear in the War Assets Regulation 4.

He pointed out that there was a difference in the language between the War Assets Regulation 4 and the War Assets Form 65.

I readily agreed with Mr. Finn that there was a

(Testimony of Edward G. Bradley.)

difference in the language, and stated that the conditions appearing on the Form 65 appeared to be considerably tougher than they were in the War Assets Regulation 4.

He asked me if I knew why there was a difference. I told him, frankly, I did not know, that apparently the people who drew up the Form 65 decided to use the language that they did, and the form was drawn accordingly.

Q. Had you participated in the preparation of that form, sir? A. No, sir.

Q. How long had you been engaged in your position which you held at the time of your conferences with Mr. Finn?

A. I had been in that position since the early part of January, 1951.

Q. What else was said on the occasion of that second meeting? [587]

A. Mr. Finn took the position that the conditions stated in War Assets Regulation 4 were the governing conditions, and I pointed out to Mr. Finn that the school did not sign War Assets Regulation No. 4, but that it had signed the War Assets Form 65, and, therefore, I felt that the conditions stated in the Form 65 were the governing conditions.

Considerable conversation took place with respect to the difference in language, and again Mr. Finn took the position that he thought the conditions outlined in Regulation 4 were governing, and I took the opposite position. I took the position that the conditions in Form 65 were governing.

(Testimony of Edward G. Bradley.)

We discussed it at quite some length, and Mr. Finn inquired as to what he had—that if the conditions on the Form 65 had to be considered, then just what title did he have. And I stated that I did not know exactly what title he had. I told him that I wasn't a lawyer, and so I suggested that it might be well if we got some of the legal people in on this, since we were getting into a discussion of the legal points. And about that time, I don't know whether it was by mutual consent, or whether I suggested it or Mr. Finn, but we arranged the meeting between the legal representatives of the Federal Security Agency, and the people over at Civil Aeronautics Administration who were interested in the phase of the registration of the plane.

Q. Was there then a meeting, in fact, held pursuant [588] to that arrangement?

A. Yes, sir.

Q. How long after the second meeting with Mr. Finn did that meeting with the lawyers occur?

A. I think it was probably in a day or two. I am not quite sure just how many days intervened, but it was very closely after that.

Q. What persons were present at that third meeting, Mr. Bradley?

A. At that meeting Mr. Hiller and Mr. Davidson from the Office of the General Counsel in Federal Security Agency were present, Mr. Finn, of course, and Miss O'Neil and a Mr. Howard. Miss O'Neil, I believe, is in charge of registration of aircraft at Civil Aeronautics Administration. Mr.

(Testimony of Edward G. Bradley.)

Howard is an attorney or was an attorney at Civil Aeronautics Administration. And myself.

Q. Now, do you recall the conversation that occurred on that occasion?

A. I introduced the subject by stating Mr. Finn's purpose, which was to obtain a release of restrictions on the aircraft that he had purchased from the school district. Thereafter I took little part in that discussion, because most of the conversation was in the nature of a debate on the legal aspects of title, just what interest Mr. Finn had, what the interest of the United States was, and, as I say, not being a [589] lawyer, I did not actively—I did not participate in that discussion to any great extent.

Q. Did you follow the general tenor of that discussion, Mr. Bradley?

A. I did. And, Mr. Finn, as I recall it, again took the position that the conditions stated in Regulation 4 were the governing conditions. And I can recall Mr. Hiller and Mr. Davidson of the Federal Security Agency taking the opposite side. They insisted that the scrapping provisions in Form 65 was the governing factor.

That went on for quite some time, and at one point the attorney, Mr. Howard, ventured a personal opinion, as I recall it——

Q. Mr. Howard from what agency?

A. Mr. Howard was from the Civil Aeronautics Administration. He ventured a personal opinion that under the Civil Aeronautics Administration

(Testimony of Edward G. Bradley.)

rules and regulations that it was quite possible that Mr. Finn had enough interest to register the plane, but that this did not constitute proof of ownership, that the matter of ownership was a matter to be decided in a court of law; that if there was any dispute between Mr. Finn and the Government, or anyone who purchased an educational aircraft, that the registration did not confer absolute ownership on the individual.

Q. What was said thereafter by the several persons [590] present?

A. Well, on that point, as I recall it, the Federal Security Agency lawyers did not agree that there was a registerable interest, and they proceeded for some time, and, as I say, I did not participate in that discussion.

Q. Now, did the Federal Security Agency lawyers address their remarks to Mr. Finn, or to Mr. Howard, or to both of them?

A. Well, as I recall it, they were addressed to both, to Mr. Howard and to Mr. Finn.

Q. What else do you recall of that conversation, Mr. Bradley? A. I recall Mr. Hiller——

Q. Mr. Hiller being one of the lawyers at Federal Security Agency?

A. Mr. Hiller, being one of the Federal Security Agency lawyers, restated the policy that I had stated to Mr. Finn in previous meetings, that, regardless, we had no authority to go contrary to the policy that was established by the Office of the Administrator, that the Department of Defense and the

(Testimony of Edward G. Bradley.)

State Department had insisted that we insist upon the scrap warranty provisions. The Department of Defense because they considered any aircraft to be an implement of war; the State Department because it felt that the shipping of these planes to foreign countries might jeopardize their [591] foreign relations at that time.

I recall also that Mr. Hiller of the Federal Security Agency told Mr. Finn that we had no authority to release the restrictions, or give consent, that the only recourse that he had was to apply to the Office of the Administrator himself, or to the Administrator himself, that he would be the only one in the Federal Security Agency who could give him any relief in the matter.

The Court: During the course of this conversation you told Mr. Finn you were not a lawyer. Did he make any statement as to whether or not he was a lawyer?

The Witness: No, sir, he did not.

The Court: Did he say he was or was not?

The Witness: I don't believe that he made either a positive or a negative statement in that respect, sir.

Q. (By Mr. Abbott): Are you familiar with the delegations of authority within the Federal Security Agency, as they existed at the time of your conversations with Mr. Finn? A. Yes, sir.

Q. In particular, are you and were you then aware of the delegations of authority to perform the functions conferred upon the Administrator of

(Testimony of Edward G. Bradley.)

the Federal Security Agency by the Federal Property and Administrative Services Act of 1949?

A. Yes, sir. [592]

Q. —40 United States Code, Section 484(k) (2)(a), which relates, in general, to the power to modify or release restrictions imposed in instruments by which interests are conferred pursuant to the Surplus Property Act of 1944?

A. Yes, sir.

Q. What persons within the Federal Security Agency had been authorized to perform the functions described in the statute I have just mentioned?

A. The Administrator of the Federal Security Agency was authorized, and the Administrator delegated that authority to the Director of the Office of Field Services, and to the Chief of the Surplus Property Utilization Division.

Q. Were any one of those three persons present at any of your meetings with Mr. Finn?

A. No, sir.

Q. Has any one of those three persons, to your knowledge, taken any action whatsoever with respect to any aircraft in the possession of the Vineland Elementary School District prior to your meetings with Mr. Finn?

Well, let me simplify the question, sir. Has any one of those three persons you have described taken any action to release or modify restrictions existing with respect to aircraft in the possession of the Vineland Elementary School District?

A. No, sir. [593]

(Testimony of Edward G. Bradley.)

Mr. Blackman: Just a moment. To which we object as calling for a conclusion of this witness, and a matter not within his own personal knowledge. [594]

Mr. Abbott: It does, your Honor.

The Court: You so understand?

The Witness: Would you please repeat the question?

Mr. Abbott: Certainly.

Q. (By Mr. Abbott): To your knowledge, Mr. Bradley, has any one of the three people you have named as having authority to act under the described statute taken any action to modify or release restrictions existing with respect to aircraft in the possession of the Vineland Elementary School District?

A. Not to my knowledge; through, possibly, the middle of June, 1951.

Q. Why do you make that qualification?

A. About the middle of June, 1951, I transferred to another program. I left the surplus property program.

Q. Do you have any information that would indicate that after that date such action was taken by any one of the three named persons?

A. I have no such information.

Q. To your knowledge has the notice of the General Services Administrator required by the statute last cited ever been given?

A. Not to my knowledge, through, possibly, the middle of June, 1951.

(Testimony of Edward G. Bradley.)

Q. Well, in fact, to your knowledge has it occurred thereafter? [595]

A. It has not, to my knowledge.

Q. If such action by any one of the three authorized persons you have named, releasing or modifying restrictions on aircraft in the possession of the Vineland Elementary School District had occurred during the time when you were operating, holding the position of director of the compliance section, if such action had occurred during that period, would you have known of it? A. Yes.

Q. If a notice of the General Services Administrator, as required by the statute last cited, had been given, would you have known of it?

A. Yes, sir.

Q. Have you described everything that occurred at the third meeting attended by the several lawyers, Mr. Bradley?

A. I believe that that about sums it up.

Q. Did you have any further meeting with Mr. Finn?

A. About possibly two or three days after the meeting between the representatives of the Federal Security Agency and the Civil Aeronautics Administration and Mr. Finn, Mr. Finn came into the office and he again reiterated his position that the conditions on the—stated in War Assets Regulation 4 should govern, and that he felt that he had sufficient title to warrant registration of the plane, and that he actually had complete title to it. And I did not agree with [596] Mr. Finn. I again

(Testimony of Edward G. Bradley.)

stated that the school had signed the Form 65, and that we proposed, in view of the policy of the Agency, that we proposed to enforce the terms and conditions under which the school acquired the plane.

Mr. Finn then said that he was going to submit formal application to the Civil Aeronautics Administration for registration. He asked me what I thought of that, and what the Federal Security Agency would do. I told Mr. Finn that I had no objection if he submitted formal application, that he was perfectly free to do anything he pleased. And I told him at that time that I did not know exactly what action would be taken by the Federal Security Agency; that the matter was under study by the legal department and that I did not know exactly what action would be taken.

I did tell him that we, in view of the policy, that we would have to enforce the terms of the Form 65, but that what specific action would be taken, I did not know.

Q. Was anything else said in the course of that fourth meeting, Mr. Bradley?

A. I can't recall anything else. My recollection is that it was fairly brief.

Q. Have you had any conversations with Mr. Finn, with either Mr. Finn, at any other time that you have not described in your testimony today?

A. Not that I can recall, sir. [597]

(Testimony of Edward G. Bradley.)

Q. Have you corresponded with either of those gentlemen on any occasion? A. No, sir.

Q. Calling your attention to the meeting with the several lawyers, which I believe is the third meeting you had with Mr. Finn, did any representative of the Federal Security Agency on that occasion state, as Mr. Finn has testified, that they were not able to determine why the provisions of War Assets Form 65 did not coincide with War Assets Regulation 4?

A. Would you state that again, please?

Q. Yes. Did any of the people representing the Federal Security Agency say to Mr. Finn, in the course of the meeting which the lawyers attended, that they were unable to determine why the Form 65 agreement did not coincide with the Regulation 4? A. No, no one said that.

Q. Did anyone present at that meeting with the lawyers, which we have identified as the third meeting, state that if Mr. Finn were to apply to the Civil Aeronautics Administration for a certificate of registration that such action would be acceptable to the representatives of the Federal Security Agency? A. No, sir.

Q. Was there, in the course of any of your meetings with [598] Mr. Finn, any discussion whatsoever of a policy letter from the Federal Security Agency to the Civil Aeronautics Administration which provided, by Mr. Finn's testimony, in substance that the Civil Aeronautics Administration

(Testimony of Edward G. Bradley.)

would not register aircraft in the possession of schools?

A. I know of no discussion that was had on that policy letter.

Q. Was there, to your knowledge, at the time of your several meetings with Mr. Finn any such letter in existence?

A. I did not know of any if there was.

Q. In the course of any of your meetings with Mr. Finn was there any reference to a sales receipt document?

Mr. Abbott: In this connection, I will request that the clerk put International's Exhibit A before the witness.

Q. (By Mr. Abbott): Have you had a chance to review International's Exhibit A?

A. The sales receipt, is that correct?

Q. Oh, there are several documents which are collectively marked as International's Exhibit A. If you will look at the particular short document entitled "Sales Receipt," please. A. Yes, sir.

Q. Was that document before you and discussed in the course of your meetings with Mr. Finn?

A. No, sir, it was not.

Q. Was it in the file of the Vineland Elementary School [599] District?

A. It very possibly was. I did not closely examine the Vineland School file. In our discussions with Mr. Finn the point at issue was the Form 65. And I cannot state whether this sales document was in the Vineland School file.

(Testimony of Edward G. Bradley.)

Q. In the course of the third meeting, at which the lawyers were present, did Mr. Heller and Mr. Davidson, or either of them as Mr. Finn testified, state that the sales receipt form, International's Exhibit A, had all of the fundamental requirements of a bill of sale?

A. I cannot recall such a statement being made.

Q. Was there any discussion of that document, International's Exhibit A, whatsoever?

A. Not to my knowledge. The sales receipt was not discussed.

Q. In the course of any of your meetings with Mr. Finn, did he ever identify the aircraft under discussion by serial number?

A. No, sir, he did not.

Q. Did he ever say anything to identify the aircraft more particularly than in the manner you have already described?

A. No, sir, he didn't.

Q. In the course of your last meeting with Mr. Finn, did you furnish to him any additional forms or papers which [600] you had not previously delivered to him?

A. No, sir.

Mr. Abbott: Mr. Clerk, will you place Finn's Exhibit B before the witness, please?

Q. (By Mr. Abbott): Have you examined Finn's Exhibit B, sir?

A. Yes, sir.

Q. Was that document discussed in the course of your last meeting with Mr. Finn?

A. No, sir, it was not.

Q. Was it discussed in the course of any meeting with Mr. Finn?

(Testimony of Edward G. Bradley.)

A. I cannot recall that we had any discussion on a Form 35.

Q. By "Form 35" do you mean Finn's Exhibit B? A. I mean this exhibit.

Q. Did you, in the course of that last meeting with Mr. Finn, state to him, as he has testified, that some of the provisions in the Form 65 agreement appeared there through administrative error?

A. No, sir, I did not say that.

Q. Did you make any statement in substance or effect that administrative error had caused the Form 65 to be prepared in its existing form?

A. No, sir. [601]

Q. Was such a statement made by you in the course of any of your other meetings with Mr. Finn? A. No, sir.

Q. Was the possibility of an administrative error with respect to the preparation of Form 65 ever discussed in any of those meetings?

A. No, sir.

Q. Did you state to Mr. Finn, in the course of any of those meetings, as he has testified, that he could rehabilitate and put into flight service the airplane depicted in the photographs which he showed to you? A. I think not.

Q. Did you ever state to Mr. Finn, as he has testified, that an aircraft transferred under War Assets Administration Form 65, Plaintiff's Exhibit 1, could be scrapped within the meaning of Regulation 4 at the time it was actually sold by the Gov-

(Testimony of Edward G. Bradley.)

ernment, and still within the meaning of those regulations be rehabilitated for flight?

A. I did not.

Q. In the course of your last meeting with Mr. Finn, did he tell you that the Civil Aeronautics Administration would register the airplane because they had agreed there was no condition subsequent, and that title had passed and would not revert, as he has testified? A. No, sir. [602]

Q. Was anything in substance or effect amounting to that, in thought, said?

A. No, sir. At the last meeting of Mr. Finn, he said he was going to submit formal application to C.A.A.—to the Civil Aeronautics Administration.

Q. What did you say to that?

A. I said that he had a perfect right to do so if he wished.

Mr. Abbott: No further questions, your Honor.

Cross-Examination

By Mr. Blackman:

Q. Mr. Bradley, did Mr. Finn say how he found his way into your office?

A. He said he had been referred to my office by the people at the Civil Aeronautics Administration.

Q. Do you know any of those people over there?

A. Prior to the—Mr. Finn coming in, I don't believe I did. I had had very little contact with him.

Q. So, did your official duty require you to do anything with respect to surplus aircraft?

(Testimony of Edward G. Bradley.)

A. At that time, yes.

Q. Well, in what connection?

A. Well, from time to time representatives of airlines or aircraft buyers would come in and ask if the Federal [603] Security Agency would release restrictions on educational aircraft, and I told them no. I stated the policy to them the same as I had stated it to Mr. Finn. And in each instance that I know of, there was no subsequent action on their part.

Q. Do you mean, sir, when an inquiry came into the Federal Security Agency as to whether or not that agency would release any claimed restrictions on the resale of aircraft, that the inquiry was directed to you? A. Substantially so, yes.

Q. And to your knowledge that is how the Finns found their way into your office, is that right?

A. That is——

Q. Now—oh, pardon me.

The Witness: Would you state that again?

Q. (By Mr. Blackman): To your knowledge, that is how the Finns found their way into your office? In other words, they had a similar problem which they wanted to discuss with you?

A. That is correct.

Q. And the very first time that you discussed the matter with Mr. Finn he told you that he had purchased an aircraft from the Vineland School District? A. Yes.

Q. And that he wanted to fly it? [604]

A. Yes, sir.

(Testimony of Edward G. Bradley.)

Q. Who brought up the question of restrictions, you or him?

A. Mr. Finn stated that the C.A.A. said he would have to have a bill of sale from the Federal Security Agency, which would release the restrictions contained in the agreement the school signed when it acquired the aircraft, and that without that they would not register the plane.

Q. Were you aware of a Form 65 agreement that had been executed by the School District in connection with the airplane in suit?

Mr. Abbott: We object to the form of that question. The Form 65 agreement is not an instrument which relates to any particular property. It is all encompassing in its terms.

Mr. Blackman: If it includes the particular property I think the question is proper.

Mr. Abbott: The particular property had never been selected or delivered at the time of the execution of the Form 65 agreement, your Honor.

Mr. Blackman: I don't understand the basis of the objection. The Form 65 agreement, it is claimed now, relates to the particular property in suit. That is the only purpose of my question, was he aware of that agreement at the time the Finns first spoke to him.

The Court: Aware of the existence of it? [605]

Mr. Blackman: Yes.

The Court: Overruled. You may answer.

The Witness: Yes.

Q. (By Mr. Blackman): When did you first

(Testimony of Edward G. Bradley.)

become aware of the existence of that agreement as it related to this airplane?

Mr. Abbott: Same objection. Assumes a state of the record which is not correct.

The Court: It is certainly not in variance with the Government's contention, is it? The Government contends the Form 65 does control the disposition of this particular plane in suit.

Mr. Abbott: Yes, your Honor. But the question suggests the Form 65 is a form which existed——

The Court: Overruled.

The Witness: I was aware of the Form 65 as soon as I pulled the file, the Vineland School file.

Q. (By Mr. Blackman): Very well. Now, at the first meeting with the Finns you did pull the file, the Vineland School District file?

A. Yes, sir.

Q. And did you look at it?

A. I looked at the Form 65.

Q. My question is, did you look at the file with reference to the contents of the file? [606]

A. Well, I probably did thumb through some papers.

Q. Then I assume, Mr. Bradley, that in looking at the file you were aware that the Vineland School District had purchased two C-46 aircraft, were you not?

Mr. Abbott: I object to the form of the question. It assumes facts in the issue of purchase. I have no objection if the term used were "acquired possession of the aircraft."

(Testimony of Edward G. Bradley.)

The Court: Sustained.

Q. (By Mr. Blackman): You were aware of the fact that the Government had disposed of two C-46 aircraft to the Vineland School District at that time?

A. I did not check the Vineland file other than pull the Form 65. That was the point on which Mr. Finn seemed most anxious to talk. That is, the form the school had signed, the Form 65.

Q. Well, Mr. Bradley, is it your testimony that at no time that Mr. George Finn had had these conversations with you were you aware that the Vineland School District had obtained C-46 aircraft from the Government?

A. I was not aware of that.

Q. You were not aware of that?

A. No, sir.

Q. Are you aware of it today?

A. Yes, sir, I am.

Q. When did you first become aware of it? [607]

A. About a week or so ago, I believe.

Q. In your discussions with other members of your agency at the time these conversations took place, wasn't there any discussion of another C-46?

A. No, sir.

Q. You state that Mr. George Finn showed you some photographs? A. Yes, sir.

Q. Did he, in so many words, tell you those photographs related to the airplane that he was seeking to have registered?

A. That is right. He said he proposed to re-

(Testimony of Edward G. Bradley.)

habilitate that and start in an airline, and he wanted to register the plane.

Q. The language then was he proposed to rehabilitate the C-46 depicted in those photographs, register it and start an airline? A. Yes, sir.

Q. To your knowledge, did he ever register that C-46 aircraft?

A. I found out subsequently that the Civil Aeronautics Administration did register an aircraft.

Q. So that there was nothing in that statement of facts that Mr. Finn made to you that in any way you have since found out was untrue, was there? [608]

Mr. Abbott: May we have a clarification? What statement of facts?

Mr. Blackman: Well, the statement—may I answer counsel?

The Court: Yes.

Mr. Blackman: The statement of facts that Mr. George Finn told the witness that he intended to register the second C-46 and rehabilitate the same. Now, I have asked the witness whether he found out whether the second C-46 was registered. I will offer a stipulation that the second C-46 in truth and in fact has been registered in the Finns' name.

Mr. Abbott: I object to the second C-46. The whole tenor of conversation is that there is but one airplane under discussion.

Mr. Blackman: If your Honor please, if the witness misunderstood what Mr. George Finn stated, I believe I have a right to attempt to show that.

(Testimony of Edward G. Bradley.)

The question here is whether or not the witness has since discovered anything false about the statement Mr. George Finn made that he intended to register the second C-46. I offer the stipulation——

The Court: Why do you call it the “second C-46”?

Mr. Blackman: Because it is not the one in suit. I will call it the hulk.

The Court: Call it “an airplane other than the airplane in suit.” [609]

Mr. Blackman: Yes, sir, an airplane other than the airplane in suit.

The Court: You may ask him.

Mr. Blackman: I will offer a stipulation, first of all, that the C-46, other than the aircraft in suit, has in truth and in fact been registered by the Civil Aeronautics Administration to the Finns.

Is that stipulation acceptable?

Mr. Abbott: It is acceptable if the date of registration is fixed, which is a date sometime prior to the registration of the aircraft in suit. Otherwise, it is incomplete.

Mr. Blackman: Whatever the date is.

The Court: May it be stipulated that some time before the registration of the airplane in suit the defendants Finn had registered with the Civil Aeronautics authorities the airplane referred to here as the hulk?

Mr. Blackman: Yes, your Honor.

Mr. Abbott: In their own names, your Honor, it is so stipulated.

(Testimony of Edward G. Bradley.)

The Court: Very well.

Mr. Blackman: As far as the records are concerned, I offer the further stipulation that it still remains registered to them.

Mr. Abbott: So stipulated. And, may it please the court, I will request the defendants Finn supply the [610] registration certificate and the Government will stipulate to it.

Mr. Charles C. Finn: We will be glad to do that.

The Court: Do you have it?

Mr. Charles C. Finn: I think it may be in evidence.

Mr. George C. Finn: I have it, your Honor.

The Court: Is it among the exhibits marked for identification?

Mr. George C. Finn: No, your Honor. It is in another file. I have the original of that.

The Court: Well, it isn't going to do any good to produce these things after the trial.

Mr. George C. Finn: Your Honor, I am not producing this for my benefit.

The Court: Very well.

Q. (By Mr. Blackman): Now, my question, Mr. Bradley, is this: Have you since that conversation found out anything untrue about Mr. George Finn's statement, as he made it to you, concerning the airplane depicted in those photographs?

The Witness: Would you please repeat that?

Mr. Blackman: Mr. Reporter, would you please read the question?

(The question was read.)

(Testimony of Edward G. Bradley.)

The Witness: No.

The Court: By "those photographs," I take it you mean the photographs which the defendant Finn showed the witness [611] in Washington on the occasion the witness testified to.

Mr. Blackman: Yes.

The Court: Photographs which have not been produced here.

Mr. Blackman: Yes.

The Court: Do you so understand the question?

The Witness: Yes, sir.

Q. (By Mr. Blackman): Now, you stated that you were not aware, Mr. Bradley, of the C-46 not in suit having been purchased by Vineland at the time of that conversation in Washington, but you are aware of that fact today.

Now, would an examination of the Vineland file, which you pulled for Mr. Finn at the time he was in your office in Washington, D. C., have disclosed the fact there were two C-46 aircraft obtained by the School District, had you looked in that file and examined those documents?

A. I believe it would, yes.

Q. But you never did that, is that right?

A. No, sir.

Q. Yet, as I understand you, Mr. Bradley, Mr. Finn was quite anxious about obtaining some sort of a sales document that he could present to the Civil Aeronautics Administration, was he not?

A. I believe he was.

Q. And one reason he expressed to you was that

(Testimony of Edward G. Bradley.)

he wanted to look in the file to see whether or not such a sales [612] document existed there, did he not?

A. I can't recall that specifically. Mr. Finn asked me if he could look at the entire school file. I told him yes. He didn't make any specific reference to any particular documents. So I made the file available to him at a nearby desk, and he sat down for probably an hour. He may have looked at the documents, and so forth. I didn't stand by Mr. Finn while he was looking in the file.

Q. Did you ever look into the file at any time when he was not immediately present?

A. I can't recall that I did.

Q. Did he ever tell you, "Here, I have found a sales document," or anything to that effect?

A. He may have. It is quite possible.

Mr. Blackman: Mr. Clerk, will you lay before the witness International's Exhibit A? Perhaps the witness has that exhibit, which consists of a sheaf of photostatic copies from the Civil Aeronautics Administration.

Q. (By Mr. Blackman): Directing your attention to the first photostatic copy that appears therein, do you see a sales receipt?

A. Yes, sir.

Q. Isn't that the sales receipt that Mr. Finn stated that he needed for the purpose of registering the airplane?

Mr. Abbott: Objection. It assumes a fact not in

(Testimony of Edward G. Bradley.)

evidence. [613] The witness has testified directly to the contrary.

The Court: Sustained.

Q. (By Mr. Blackman): Have you ever seen that sales receipt before?

A. I don't believe so.

Q. You don't believe so. Did Mr. Finn tell you, after he had looked through the file, that he had found any paper that would be useful to him in registering the airplane?

A. Well, I don't know whether he used that expression. He did say that he wanted a copy of the Form 65. And I can't recall that there was any discussion about any other particular papers. I had the file and he could have made copies if he so desired.

Q. Mr. Bradley, you had been familiar with the surplus property transactions before Mr. George Finn came into your office, had you not?

A. Would you please repeat that?

Q. You had been familiar with the surplus property transactions before the meeting with Mr. George Finn, had you not?

A. By "surplus property," could you mean aircraft?

Q. Yes.

A. I started to work on aircraft in January of 1951. I then became conscious of the aircraft disposal program as it was conducted by the War Assets Administration. [614]

(Testimony of Edward G. Bradley.)

Q. Is it not a fact that in these files which the Government maintains concerning the disposal of any particular piece of property, they attempt to keep a copy of whatever documents have been delivered to whoever has purchased that property?

A. That is right.

Q. So that if the Government delivered a sales receipt such as the one you are now looking at, attached to International's Exhibit A, wouldn't you normally expect, in the ordinary course of business, to find a copy or a duplicate original of that sales receipt in the file in Washington?

A. That is right.

Q. So that if Mr. Finn had told you he had found such a sales receipt in there and he needed it for the purpose of registration, that would not be outside the ordinary course of business as far as you know?

Mr. Abbott: I object, your Honor. That again assumes an erroneous state of the record. This witness testified Mr. Finn made no——

Mr. Blackman: I stated, "If Mr. Finn had stated to you——" and the testimony——

The Court: That is purely hypothetical, isn't it? Sustained.

Q. (By Mr. Blackman): Now, if Mr. Finn wanted a copy of any document in that file, Mr. Bradley, how would he obtain [615] it?

A. Well, he would ask me for it, probably.

Q. Sir? A. I say he would ask me for it.

(Testimony of Edward G. Bradley.)

Q. And if he had asked you for it would you supply it to him?

A. I very probably would have.

Q. And if he asked you for a copy of the sales receipt, would you have supplied that to him?

Mr. Abbott: Objection. That again assumes an erroneous state of the record. There was no such discussion in this witness' testimony.

The Court: The question does not assume it, does it?

If he asked you for a copy of anything that appeared in the file, would you have furnished it to him?

The Witness: I believe I would, sir.

The Court: Does that cover it?

Mr. Blackman: Yes.

Q. (By Mr. Blackman): And you would have done that, Mr. Bradley, even knowing that he intended to use such a document to go over to the Civil Aeronautics Administration and get a registration certificate on the airplane?

Mr. Abbott: Objection.

The Witness: I did not know that.

The Court: If he said, "I want to take these documents [616] over to the Civil Aeronautics Administration," you would still have given them to him, wouldn't you?

The Witness: I don't believe I would.

The Court: You wouldn't have given him copies?

The Witness: I don't believe I would have, sir.

Q. (By Mr. Blackman): But your testimony

(Testimony of Edward G. Bradley.)

was that you did know that he intended to go over to the Civil Aeronautics Administration and get a registration.

Mr. Abbott: Objection, your Honor. That was not the witness' testimony as to the first or second meeting.

The Court: Sustained in that form. You may ask him if it was a fact.

Q. (By Mr. Blackman): Isn't it a fact, Mr. Bradley, that Mr. Finn at all times told you that he wanted to apply for a registration on the airplane in suit?

A. At the first meeting he did, yes.

Q. So from then——

The Court: The airplane in suit?

Mr. Blackman: In suit.

The Witness: The airplane of which he showed me pictures.

Q. (By Mr. Blackman): So that from and after——

The Witness: I did not know there were two airplanes at the time I talked to Mr. Finn.

Q. (By Mr. Blackman): From and after that time you knew that he wanted to get a registration certificate? [617]

A. Yes, sir.

Q. Now, you mentioned something about this agreement between the Defense Department and the Federal Security Agency regarding the enforcement of the scrap warranty clauses.

A. Yes.

Q. Was that ever reduced to a written document that you know of?

(Testimony of Edward G. Bradley.)

A. I believe it was, sir. I believe there is a policy letter which quotes an agreement between the Department of Defense and the then War Assets Administration which indicates that the Department of Defense, since aircraft are considered to be implements of war, that they should not, educational aircraft should not be used for flight purposes by commercial users. I think I better state that.

Q. Do you have that agreement which you say was entered into between the two agencies?

A. I am sure there must be something in the file.

Q. Or, the Federal Security Agency and the Defense Department?

A. I am sure there must be something in the file.

Mr. Blackman: Will you produce it when you have it?

Mr. Abbott: We have several policy letters, and we are thumbing through them now to find the appropriate one.

Q. (By Mr. Blackman): You stated that the primary purpose of that agreement, as far as known, was to see that these [618] aircraft did not fall into the hands of foreign governments, isn't that true?

A. Yes.

The Court: Your answer?

The Witness: Yes, sir.

Q. (By Mr. Blackman): And do you have any personal knowledge as to whether or not there were only certain limited types of aircraft that were

(Testimony of Edward G. Bradley.)

involved? Namely the aircraft that are directly used in combat?

A. Well, it was not limited to just combat type aircraft. All aircraft. Well, I wouldn't say all aircraft, but C-46s and C-47s, any large passenger-type aircraft, or any combat-type aircraft were the type that the Department of Defense was interested in not having flown.

Q. Is it not a fact that the Defense Department, at the time in question, had hundreds of C-46 aircraft sitting on fields that were in mothballs?

A. I did not know that, sir.

Q. You didn't know that? A. No, sir.

Q. Is it not a fact that there have been no C-46 aircraft manufactured since the end of World War II? A. I did not know that, sir.

Q. Well, you are certainly aware that no C-46 aircraft are being manufactured today? [619]

A. I cannot say for certain. I am not an aviation enthusiast.

Mr. Blackman: I will offer a stipulation that there have been no C-46 manufactured since the end of World War II.

Mr. Abbott: Your Honor, I don't know the date that manufacture ceased.

The Court: Will you accept counsel's statement for it?

Mr. Abbott: If he will make it by January 1, 1947. I feel confident by that date the manufacture had ceased.

Mr. Blackman: We will make it that date, with

(Testimony of Edward G. Bradley.)

leave to bring in an earlier date if we are able to produce it.

The Court: Very well. For the present purpose the stipulation is that not since January 1, 1947, have there been any Model C-47s——

Mr. Abbott: C-46s, I believe.

The Court: ——C-46 airplanes manufactured.

Mr. George C. Finn: Your Honor, may I offer the additional information that the company is out of business. The Air Force called them obsolete and cannot be used as tactical aircraft; can't obtain parts——

The Court: You are offering that further stipulation?

Mr. George C. Finn: I will offer it in the interest of justice in the courtroom to co-defendants.

Mr. Abbott: We do not so stipulate and object to the form in which the statement was made, as of January or April [620] 1951, that was not the fact, and we do not so stipulate.

The Court: Very well. The stipulation is refused.

Mr. George C. Finn: If the plaintiff has any information contrary to that, I will be glad——

The Court: The stipulation is refused.

Q. (By Mr. Blackman): Mr. Bradley, at the time Mr. Finn came in to speak to you in Washington, were you aware of any contract between the Vineland School District and the Finns relating to any airplane?

(Testimony of Edward G. Bradley.)

A. Mr. Finn stated that he had a bill of sale from the Vineland School District.

Q. Did he show it to you?

A. I believe he did.

Q. Will you look at International's Exhibit A, please? Turn to the last page on that and see if you can identify that document for me?

A. I cannot be sure that this is the document. I didn't examine it closely.

Q. But you say you do believe that he showed you the bill of sale?

A. I have that recollection.

The Court: Would this be a convenient time to suspend for the morning recess?

Mr. Blackman: Yes, your Honor.

The Court: We will take a recess for five minutes, [621] members of the jury, and you are now excused for that time subject to the usual admonition.

(The jury left the courtroom.)

The Court: You may step down, Mr. Bradley.

Let the record show that the jury have retired from the courtroom.

Has the Government any further requested instructions?

Mr. Abbott: We do, your Honor.

The Court: You may serve them and file them with the clerk.

Any other parties have any further requested instructions?

(Testimony of Edward G. Bradley.)

Mr. Nelson: We do, your Honor. We will file them at this time, if the court please.

The Court: I would like to have them before I leave the bench now.

Mr. Abbott: May the record show that all counsel have been served, your Honor?

The Court: Only all counsel? Have you served the defendants Finn?

Mr. Abbott: And the other parties appearing without counsel.

Mr. Nelson: May the record also show that the defendants Vineland School District and Bancroft instructions have been served on all parties, and counsel? [622]

The Court: Very well. Anything further, gentlemen?

Mr. Abbott: Nothing further, your Honor.

The Court: We will recess for five minutes.

(Short recess.) [623]

The Court: Let the record show the jury are present. Where is our witness, Mr. Bradley?

Mr. Abbott: Mr. Bradley.

(Thereupon the witness resumed the witness stand.)

Q. (By Mr. Blackman): Then, Mr. Bradley, I take it you did not know anything about the terms of the Vineland contract with the Finns, as a result of which they purchased the airplane in suit?

A. No, sir, I did not.

(Testimony of Edward G. Bradley.)

Q. Now, after Mr. Finn had spoken to you the first time, you state that either you or he suggested a meeting with the legal representatives of both agencies?

A. That is correct. I believe that was after the second meeting, as I recall it.

Q. After the second meeting? A. Yes.

Q. Now, at that time did you ever think that it might be useful to have present some of these government officials who you say had the authority to make these releases?

A. I didn't think that was necessary, because, as I recall it, Mr. Finn was concerned about the legal aspects on the matter of title, what interest he acquired by virtue of his purchase from the school, and a, shall we say, clarification or interpretation of War Assets Regulation 4, and also the terms which were shown on Form 65. [624]

Q. But, in any event, the stated purpose of the meeting was that the Finns wanted to obtain releases on the restrictions; isn't that true?

A. That is essentially true, sir, yes.

Q. And you notified those persons that you thought would be most vitally interested in connection with whatever business that meeting had to do with? A. Yes, sir.

Q. And everybody you notified was there?

A. Yes, sir.

Q. Now, at that meeting didn't Mr. Howard state that, in his opinion, under Civil Air Regula-

(Testimony of Edward G. Bradley.)

tions the Finns had enough interest to register title to the airplane in suit? A. Yes, he did.

Q. And you were aware that CAA was also charged with receiving proof of ownership as a condition to registering the airplane, were you not?

Mr. Abbott: Objection, your Honor. That states erroneously the record and the law.

The Court: I suggest you rephrase it.

Q. (By Mr. Blackman): You were aware that before the CAA would register an airplane, one of its duties was to receive from the applicant proof of ownership?

Mr. Abbott: The same objection, your Honor. If counsel will say "some evidence of ownership," I will have no objection. [625]

Mr. Blackman: Very well. I will rephrase it, and say as to evidence of ownership. Were you aware of of that?

The Witness: Yes, sir.

Q. (By Mr. Blackman): Well, didn't you, in your own mind, Mr. Bradley, feel that it was inconsistent for one agency to receive evidence of ownership, and go ahead and register the airplane, while the other agency maintained that there was no ownership and there was no right to ownership of the plane?

A. I didn't participate in that conversation. That was between Mr. Howard, the attorney or an attorney from the Civil Aeronautics Administration, and Mr. Hiller and Mr. Davidson, who were in

(Testimony of Edward G. Bradley.)

the office of the General Counsel in the Federal Security Agency.

Q. But that was stated in your presence, was it not, by Mr. Howard, that he thought there was sufficient evidence of ownership there to register title?

A. Yes, that is true, and the attorneys for Federal Security Agency took issue, as I recall it.

Q. Now, when one agency wants to take up a matter with another agency, isn't it customary to set forth some sort of policy letter, indicating the policy which the first agency seeks to establish?

A. I don't think I quite understand the question. [626]

Q. Well, you say that the attorneys for Federal Security Agency took issue with Mr. Howard's statement?

A. Yes, sir.

Q. Was there ever anything more than that done by the Federal Security Agency to see that this airplane was not registered?

A. I don't know what action the lawyers took in that respect.

I do know that between agencies frequently there are meetings and discussions at which the lawyers argue one side, and then argue the other, and to what conclusions they come, I don't know. I suppose they reduce them to writing. But in this instance our lawyers did not agree with Mr. Howard.

Q. Certainly it is nobody's intention to have one agency take action which is inconsistent with the position of the other agency, is it?

(Testimony of Edward G. Bradley.)

Mr. Abbott: We will object to the form of the question, your Honor. Whose intention?

The Court: It is argumentative.

Q. (By Mr. Blackman): Certainly, it was never your intention that one agency would take action that was inconsistent with the position of the agency which you represented, was it?

A. I don't know whether this was inconsistent. I think the lawyers were discussing proof of ownership, and I [627] think the Civil Aeronautics Administration law says that registration does not constitute proof of ownership. That is the side that the Federal Security Agency lawyers took.

Q. Well, let's approach it this way, Mr. Bradley; You were aware that the Finns didn't intend to scrap this airplane, were you not?

A. That's right, because Mr. Finn said that he wanted to fly it.

Q. You knew they wanted to fly it?

A. Yes, sir.

Mr. Abbott: May I inquire which aircraft is being referred to by counsel? The one in the pictures, or the one in suit?

Mr. Blackman: "This aircraft" always refers to the one in suit, your Honor.

The Court: Did you so understand it?

The Witness: No, sir. The only aircraft I had knowledge of was the pictures Mr. Finn had showed me at that time.

(Testimony of Edward G. Bradley.)

Q. (By Mr. Blackman): Well, you were aware that the Finns did not intend to scrap that airplane, weren't you? A. That's right.

Q. So that the only intention that they expressed to you concerning any aircraft was that they intended to fly it? A. Yes, sir.

Q. Were you also aware that in order to fly the aircraft, [628] you must have a registration on it? A. Yes, sir.

Q. You knew that to be the state of the law, didn't you? A. Yes, sir.

Q. Well, Mr. Bradley, were you also aware that under Civil Air Regulations an aircraft registration immediately ceases upon a scrapping of an airplane?

A. I don't think I understood the question, sir.

Q. Did you know that the scrapping of an aircraft would immediately have the effect to terminate any registration for that particular airplane?

A. I would assume so. If that were the case, that it was scrapped, then I would imagine that the registration would become null and void.

Q. Well, there was never any discussion regarding scrapping of any airplane by the Finns, when they came into this conference?

A. Not on Mr. Finn's part.

Q. You also knew, didn't you, Mr. Bradley, that the flying of this airplane or any plane that the Finns had reference to would require first that it be licensed? A. I believe I knew that.

Q. That is, a regular licensing procedure by

(Testimony of Edward G. Bradley.)

the CAA? A. I believe so, yes, sir. [629]

Q. And you knew that licensing would require the aircraft to be first put into flying condition, didn't you? A. yes.

Q. In other words, it had to be rehabilitated before it could be flown, didn't it?

A. Yes sir.

Q. You were aware that this would require the expenditure of a large amount of money by the Finns or anybody else who did it at the request of the Finns, weren't you?

A. It would appear quite so to me from the pictures, that it would have required considerable money to have put that plane in the air.

Q. You knew when this was done the airplane would be considerably improved over what you ever saw in any photograph, wouldn't it?

A. It would have to be, yes.

Q. And it would be worth more as a result of that? A. I would imagine so, yes.

Q. Did you intend to have all this happen, and then step in and have the Government own the airplane?

Mr. Abbott: Objection, your Honor. That question is argumentative in the extreme.

The Court: Sustained.

Q. (By Mr. Blackman): Did you intend to let all this happen? [630] A. No, sir.

Q. Did you take any steps to stop it?

(Testimony of Edward G. Bradley.)

A. I reported the meeting with Mr. Finn to my superior, who was the Chief of the Surplus Property Disposal Division. I reported just what took place.

Q. To whom did you report it, sir?

A. To the Chief of the Surplus Property Utilization Division, who was my superior.

Q. Is he one of the individuals that had this delegation of authority which you spoke of?

A. Yes, sir.

Q. You reported it to him? A. Yes, sir.

Q. To your knowledge, did he take any steps to stop the registration?

A. Up to the middle of June, I do not know—beyond the middle of June, I do not know. I was not aware of any definite action that he took between the time that Mr. Finn was in the office and the middle of June, 1951.

Q. Up until the middle of June, as far as your personal knowledge is concerned, he took no steps to stop the registration; is that right?

A. As far as I know, sir.

Q. You were asked concerning this RFC Form 35.

Mr. Blackman: Mr. Clerk, will you lay before the witness [631] Defendants Finn Exhibit B?

(The document was placed before the witness.)

Q. (By Mr. Blackman): Do you have it, Mr. Bradley? A. Yes, sir, I have it, sir.

(Testimony of Edward G. Bradley.)

Q. Have you ever seen a document like that before? A. I have seen a blank Form 35.

Q. Did you ever hear of the Grossmont School?

A. No, sir.

Q. Did you ever see a document that had markings on it similar to that? A. No, sir.

Q. Would those markings have any meaning to you? I want you to look at it carefully, if you will, please. The answer?

A. Would you mind restating the question, please?

Q. Would those markings have any meaning to you? A. No, sir, they wouldn't particularly.

Q. You were not in the agency at the time that the Regulation 4, effective at the time of the sale of the airplane in suit was promulgated?

A. No, sir, I was not.

Q. Who in the agency would be responsible for the draftsmanship of the War Assets Form 65?

A. I wouldn't have the slightest idea, sir.

Q. It would be some predecessor of yours? [632]

A. I beg pardon?

Q. It would be some predecessor of yours?

A. I don't know what you mean by "predecessor."

Q. Well, someone who held your official position before you did?

A. It wouldn't necessarily be my official position. It would be someone who was concerned with the disposal of aircraft in War Assets at that time.

(Testimony of Edward G. Bradley.)

Q. At this moment you wouldn't have the slightest idea who it was who drafted the contract?

A. No, sir.

Q. War Assets Form 65, which is Plaintiff's Exhibit 1 in evidence? A. No, sir.

Q. Very well. Had you ever seen that form before the Finns, or before Mr. George Finn asked for a copy of it out of the Vineland School District file?

A. I had—I believe I had seen a copy of the Form 35.

Q. 35 or 65?

A. This is Form 25 that I have here.

Q. My question was as to Form 65.

A. Oh. Would you please state it again, then?

Q. Had you ever seen a copy of War Assets Form 65 before Mr. George Finn asked to see it in the Vineland School [633] District file?

A. Yes, sir, I had.

Q. When did you first see it before that time?

A. Probably sometime in January or February of '51.

Q. At that time did you ever check the form against the regulations? A. No, sir, I didn't.

Q. Nobody told you to? A. No, sir.

Q. And, I assume, you just never did?

A. No, sir.

Q. Is that right? A. Yes, sir.

Q. Had you ever heard it discussed by anybody in the agency? A. No, sir.

Q. And you stated a few moments ago you had

(Testimony of Edward G. Bradley.)

seen a Form 35, which is the Defendants Finn Exhibit B, for identification?

A. I believe I had, sir.

Mr. Abbott: We will object to that, insofar as the question implies that he saw this form with the notations. The witness' testimony is that he saw a blank Form 35.

Mr. Blackman: Your Honor, I will accept that.

The Court: I suggest you rephrase your question, and be [634] specific.

Q. (By Mr. Blackman): You had seen a copy of the War Assets Form 35, which is the form of the agreement, aside from the writings which appear thereon, Finns' Exhibit B, for identification?

A. That is, the RFC form?

Q. Yes. A. I had seen a blank.

Q. When?

A. Oh, possibly sometime between January of 1951, and June of '51.

Q. Had you ever compared the Form 35, with the Form 65? A. Yes.

Q. Did that comparison lead you to any conclusion as to whether there was any difference between the two forms?

A. No, sir. The sentence with respect to the scrapping provisions of Form 35, and on the Form 65, are identical.

Q. They are identical? A. Yes, sir.

Q. And the Form 35, do you know when that was first used by the RFC?

A. It was sometime before I ever came with the agency.

(Testimony of Edward G. Bradley.)

Q. As a matter of fact, it was sometime before the promulgation of Regulation 4, that was in effect at the time this airplane in suit was disposed of, was it not? [635]

A. I would assume so, from the date that appears on the form.

Q. To your personal knowledge, at the time the current regulation was promulgated, there was no change made in the form, the old form of the disposal agreement, being the Form 35, and the form which was used at the time the School District signed Plaintiff's Exhibit 1? There was no change at that time, was there?

A. What do you mean by "current regulation"?

Q. Well, the regulation in effect at the time the aircraft in suit was disposed of.

A. I am afraid you will have to repeat the question. I am very sorry that I didn't—

Q. To your personal knowledge, was there any change made between the Form 35 agreement and the Form 65 agreement, insofar as the scrapping provision is concerned at any time?

Mr. Abbott: Your Honor, those two forms are before the court, and they speak for themselves, and we, therefore, object to the form of the question. Whether they are different or the same is apparent on their face.

The Court: Sustained.

Q. (By Mr. Blackman): Did you ever hear a discussion, Mr. Bradley, as to whether or not there

(Testimony of Edward G. Bradley.)

should be any change between the two forms of agreement by reason of the new regulation which was enacted immediately prior to the time that the [636] aircraft in suit was disposed of?

A. No, sir.

Q. Are you familiar with the educational disposal program, Mr. Bradley?

A. I am, somewhat.

Q. Is it not a fact that there was a requirement that before surplus property could be disposed of to educational institutions that it first be found to be commercially unsalable?

Mr. Abbott: Objection. This witness has no qualifications in that respect. Since he was not with the Federal Security Agency until January, 1951, he was in no way participating in the disposal provisions in 1946, and, therefore, would be an incompetent witness on that point.

The Court: What difference would it make? What is the purpose of the question?

Mr. Blackman: I will offer a stipulation that this particular airplane was first found to be commercially unsalable before it was disposed of.

The Court: The airplane in suit?

Mr. Blackman: Yes.

Mr. Abbott: I cannot so stipulate because at that time, as shown by the Government's own witness, it had a fair market value of \$5,000.

Mr. Blackman: I believe that counsel has already stipulated [637] that this disposal was in the ordinary course of business so far as the Govern-

(Testimony of Edward G. Bradley.)

ment is concerned. However, that stipulation has not been offered in open court since the jury has been impaneled, and since it is one which we do believe to be material, I will repeat the stipulation here, and offer it to the Government.

The Court: What is the stipulation which you propose now?

Mr. Blackman: That the disposal of the airplane in suit was made by the Government in the ordinary course of its business, and pursuant to all existing laws and regulations in effect at that time.

Mr. Abbott: So stipulated.

Mr. Blackman: Very well.

Q. (By Mr. Blackman): Mr. Bradley, are you aware of other school district aircraft that have been sold on the open market?

A. I have heard of—

Mr. Abbott: May we have a clarification, your Honor? We object to the form of the question. Counsel does not identify what he means by “school district aircraft.”

Mr. Blackman: Very well.

Mr. Abbott: Nor how sold on the open market.

Q. (By Mr. Blackman): Are you aware of surplus property aircraft owned by school districts which have been sold to [638] private consumers?

A. I have heard of some cases.

Q. Do you have any personal knowledge of such sales? A. No, sir.

Q. Are you aware of one that was located up at Lancaster, California, and sold this year?

(Testimony of Edward G. Bradley.)

A. No, sir.

Q. Are you aware of one that was sold by the University of Southern California, a C-46?

A. No, sir.

Q. What knowledge do you have concerning the sale of surplus aircraft sold by school districts?

A. I haven't any.

Q. None at all?

A. I am not in that division at all.

Q. Then on the questions which counsel asked you concerning the personal knowledge that you have, would it be true that you don't have any personal knowledge as to whether notice to the General Services Administration has been given in connection with the aircraft in suit?

A. Would you please repeat that? [639]

Q. I believe you were asked whether notice to the General Services Administrator had been given in connection with this particular airplane. Do you recall anything like that?

Mr. Abbott: By "this particular airplane"—

Mr. Blackman: The airplane in suit.

The Witness: I recall having said that I had no knowledge of any notice being given to the General Services Administrator.

Q. (By Mr. Blackman): Well, that is what I wish to develop, that you do not have any knowledge one way or the other on the subject.

A. That is right, sir.

Q. Very well. With respect to what any of your superiors may have done regarding a release of

(Testimony of Edward G. Bradley.)

the restrictions of the airplane in suit, you have no knowledge one way or the other on that, either, have you? A. No, sir.

Q. All you know is that you reported the transaction or the incident with the Finns to your superiors? A. That is right.

Mr. Blackman: That is all.

The Court: Any further cross-examination of this witness?

Q. (By Mr. Nelson): Mr. Bradley, calling your attention to this meeting which you had with the counsel at C.A.A., [640] and two members, apparently of F.S.A., counsel were also present, were you present at that entire meeting? A. Yes, sir.

Q. Was it a formal or an informal type meeting?

A. I would say it was rather informal. The place where I work was a rather large room. There were seven or eight desks, and three or four men and their secretaries sat there. And we sort of gathered around one desk. It was an informal type meeting.

Q. And at times there were individuals discussing matters between themselves while the meeting was going on?

A. I would say that would be a very good description.

Q. Is it possible then that these conversations concerning the release of the particular aircraft could have taken place between the Finns and some other member at that conference, and you didn't hear it?

(Testimony of Edward G. Bradley.)

Mr. Abbott: May we have an identification of the aircraft?

Mr. Nelson: I always refer to the aircraft in suit.

Mr. Abbott: Then we object to the form of the question. The witness' testimony is that there was no conversation on any airplane except the hulk.

Mr. Nelson: My question is, could these have taken place without his knowledge.

The Court: I suggest you reframe the question and not assume facts not in evidence. [641]

Q. (By Mr. Nelson): Could conversations have taken place, Mr. Bradley, between, other persons present at this meeting concerning the release of restrictions on any aircraft?

A. Conversations which I did not hear?

Q. Yes.

A. That is possible.

Q. Now, you indicated earlier, Mr. Bradley, that you are not a lawyer, and this particular meeting went into matters which were technical in nature, is that true? A. Yes, sir.

Q. You also indicated that most of the conversations were between the lawyers and that you more or less sat back and listened as the debate went on.

A. Yes, sir.

Q. Is it possible that whatever decision which was the result of that meeting was one which was technical and which you do not have any particular knowledge—— A. Would you please——

Q. ——because it was technical in nature? I

(Testimony of Edward G. Bradley.)

will rephrase the question. Isn't it possible, Mr. Bradley, that inasmuch as the decisions and discussions were technical in nature, that you, as a layman, would not have any personal knowledge as to what final decision was made by the people present at that meeting?

A. I don't think that would be so. I believe that any [642] decisions, if any were made, would be reduced to language which would be understood by all. Not all there were lawyers. Miss O'Neil was not a lawyer. I was not a lawyer. I believe that it would have been reduced to language that we would understand, if a decision had been made.

Q. Was there such a summary or reduction of the matters that were discussed made at the termination of this meeting?

A. As I recall it, Mr. Heller, an F.S.A. attorney, stated that in view of the policy, we could not release the restrictions, and that if Mr. Finn felt that he wanted to go to a higher authority he could see the Administrator.

Q. Do you have any knowledge, Mr. Bradley, of any other meetings of the counsel of C.A.A. and F.S.A., Federal Security Agency lawyers, besides this one, and after this one, wherein they discussed this matter of releases of restrictions?

A. I have no knowledge of such a meeting.

Q. Could that meeting have taken place?

A. It might have. I doubt it, because I would have heard of it, I think.

(Testimony of Edward G. Bradley.)

The Court: Would it be part of your duties to have known about it?

The Witness: I should. It would fall within my area for the lawyers to have reported any subsequent discussions they had with——

The Court: Can the jury hear this? [643]

A Juror: No.

The Court: Please read it, Mr. Reporter.

Address your remarks to the jury, Mr. Bradley.

(The record was read.)

The Witness: ——with the Civil Aeronautics attorneys.

Q. (By Mr. Nelson): Are the counsel of F.S.A. located in the same building that you are in, or were in at that time? A. Yes, sir.

Q. Approximately how many counsel did they have?

A. Well, there was quite a few of them around there. They possibly have 30 or 40 lawyers.

Q. Do each one of them report to you any time they have a discussion concerning the disposal of surplus property that might come into your channel?

A. Only two lawyers were working on surplus property matters.

Q. Was it their policy to report each instance, if they discussed any of these matters with any other agency of the Government, to you?

A. If it had a bearing on work I was doing.

(Testimony of Edward G. Bradley.)

Q. How long were you chief of this Compliance Division?

A. From January of 1951 to about the middle of June of 1951.

Q. Now, you have indicated that you have been a member of the federal service since 1934, is that correct? [644]

A. Yes, sir.

Q. Has it usually been your task to meet the public on various matters concerning the Government in connection with this Government service?

A. No, sir. I have held several positions with the Government, some of which have brought me in contact with the public and some of which have not.

Q. In connection with this position you had as chief of the Compliance Division, did you not see people every day that were coming in from out of town in connection with matters of your office?

A. That is right. That is true.

Q. Were there many people that came in, or just one or two a day?

A. I would say that maybe several in the course of a week came in. Usually these people would inquire as to the restrictions that were—the restrictions that were placed on educational aircraft. And they want to get a release of the restrictions. And I always acquainted them with the policy of the F.S.A. and told them I was powerless to do anything about it.

Q. Did you have any other meetings with an agent of a school or a person who was inquiring

(Testimony of Edward G. Bradley.)

as to obtaining releases of an aircraft at a school?

A. Yes, I had several. [645]

Q. Can you recall those meetings at this time?

A. I cannot recall the specific meetings.

Q. What is there about this particular meeting, Mr. Bradley, which allows you to recall each instance of conversation and meeting which occurred in connection therewith?

A. This was a very lengthy conversation. Mr. Finn visited my office, I believe, four times. That was very unusual. It was unusual because in all other cases where representatives of aircraft companies or people interested in purchasing educational aircraft, that when they inquired about the release of restrictions, I told them about the Administrator's policy, about our agreement with the Department of Defense, and I told them that under no circumstances would we release restrictions with regard to the scrapping. I acquainted them with our agreement with the Department of Defense to recapture plans that became excess to educational needs, or unfit for the purpose for which they were transferred. And in effect, I stated that we had put a freeze on any educational aircraft that was not being used by a school for educational purposes.

The people accepted that. And to my knowledge they never came back the second time.

Q. These conversations and meetings with the Finns all occurred over three years ago, did they not?

A. Approximately so. [646]

Mr. Nelson: No further questions, your Honor.

(Testimony of Edward G. Bradley.)

Mr. Abbott: If your Honor please, counsel has——

Mr. George C. Finn: Pardon me.

The Court: You wish to examine the witness?

Mr. George C. Finn: Well, your Honor, in the interest of——

The Court: Do you wish to examine the witness?

Mr. George C. Finn: Yes.

The Court: Proceed to the lectern and examine him.

Q. (By Mr. George C. Finn): Mr. Bradley, you remember when I first came to your office in April? A. Yes, sir.

Q. Do you remember when I told you I had a problem I would like you to help me solve, is that correct?

A. You may have used those words, Mr. Finn.

Q. Pardon?

A. I say, you may have used those words. I don't know whether I recall that exactly.

Q. Was your attitude friendly, Mr. Bradley, or was it antagonistic? Or what was your attitude?

A. I would say my attitude was friendly.

Q. We sort of got along pretty well together, didn't we? A. I would say so.

Q. It was sort of one Irishman to another, trying to [647] get to a solution of a problem, is that correct?

A. Well, I could not agree, Mr. Finn, that there was a solution to the problem.

(Testimony of Edward G. Bradley.)

Q. That isn't the point. But, I mean, we didn't know whether there was or not, did we?

A. I knew that there was no immediate solution.

Q. No immediate solution. Did you put any obstacles in my way, Mr. Bradley, toward understanding this situation at all?

A. Well, the only obstacle I put in your way, I guess, was by stating to you the policy of the agency and the fact that we would not grant a release.

Q. That is correct. But otherwise, you didn't tell me it couldn't be done, and no way to find out any information whether it was necessary, where I could obtain a proper understanding of this thing, did you? You didn't well, sort of pass the buck and pass me around the circle, did you?

A. I don't believe I did.

Q. In fact, Mr. Bradley, you did try to help me, didn't you?

A. I don't think you can call it "help." I was sympathetic to your desires.

Q. Thank you.

A. But I realized, and I told you of the obstacles that were in your way and that the agency policy was hard and fast; [648] that I had no authority to waive that. And there was nothing I could do to help you.

Q. Well, you did refer me to certain regulations, didn't you?

A. Yes. I felt that possibly you might want to read them.

(Testimony of Edward G. Bradley.)

Q. And you felt that I should know, didn't you?

A. At our first meeting, Mr. Finn, I was under the distinct impression that you did not know the conditions under which the school acquired the plane.

Q. That was true, too, wasn't it, Mr. Bradley?

A. I presume so. I didn't know that to be a fact, and for that reason, I, and in fairness to you, I thought that you should know what the conditions were under which the school had bought the plane, had acquired it.

Q. You were trying to be fair at all times, weren't you, Mr. Bradley?

A. I felt that I was.

Q. Do you remember that the first time that I knew such Form 65 existed was when we found it in the file of Vineland School District?

Mr. Abbott: I object to the form of the question. The witness isn't competent to state an opinion as to Mr. Finn's state of mind.

The Court: You understand the [649-650] question?

Mr. George C. Finn: I will rephrase it.

Q. (By Mr. George C. Finn): You did know, and I had told you, that I did not exactly know what these restrictions were? I actually didn't know what I was up against at the time. And if you recall, we went to the file—do you recall that there we discovered the Form 65? A. Yes, sir.

Q. That is correct? A. Yes, sir.

Q. Fine. Now, do you recall, also, that you stated

(Testimony of Edward G. Bradley.)

that this file was available to me for my use as a public record?

A. I believe, Mr. Finn, that you asked me if you could examine the file in some detail, and I said, "Why, of course, you can."

Q. Yes. And you said that I couldn't take it out of the office, but if I cared to peruse the file in your office it was available, is that correct?

A. Yes.

Q. And that if I needed any copies of any documents that you could make copies of those, but you would not allow me to take the file away, that it wasn't proper?

A. I believe, as far as copies were concerned, we only discussed—this is my recollection—that we only discussed a copy of the Form 65. [651]

Q. Mr. Bradley, do you remember the Heddleston—a letter signed by Mr. Heddlestone? I asked if I could make a copy of that, and you referred me to a typewriter and you said, "You can't take it out, but you can sit here at the typewriter and copy this, if you like." Do you remember that?

A. I don't have a clear recollection of that, Mr. Finn. But I may have said that.

Q. Mr. Bradley, if I show you a copy of that letter, do you think you would recognize it?

A. I don't know whether I would or not.

Mr. George C. Finn: I will try. Your Honor, I don't know which exhibit it is.

The Court: Do you know the date of it?

(Testimony of Edward G. Bradley.)

Mr. Blackman: Your Honor, I find such a letter listed in Finns' exhibits as Exhibit E.

Mr. George C. Finn: Yes, sir.

The Court: Place Defendants Finn Exhibit E before the witness. That is in evidence now, isn't it?

Mr. Blackman: No, sir. Well, now, just a moment. I am not sure about that. I think it is. I have a little check mark after it.

Mr. George C. Finn: I think it is.

The Court: It is a teletype, is it not, dated July 10, 1946, Regional Director to Chief of the Fiscal Branch?

Mr. Blackman: Yes. [652]

The Court: Do you have it, Mr. Bradley?

The Witness: Yes, sir.

The Court: Your question?

Q. (By Mr. George C. Finn): Do you recognize that document as coming from the files, Mr. Bradley?

A. I don't recognize the document, as such. But it must have been a part of the Vineland School folder.

If you will recall, I did not go through the Vineland file with you. When you first appeared at the office, it was the first time we had had occasion to pull the Vineland file. And since you wanted to look at it, I said yes, and you sat at a desk and you looked at it, and I did not sit with you. Is that your recollection? [653]

Q. That is correct, Mr. Bradley, but you said that if there were any copies that I needed, you

(Testimony of Edward G. Bradley.)

would supply them, and do you remember that I was to check with you before I had any copies made, that you would take care of that? In other words, I couldn't steal any papers out of the file, Mr. Bradley, and it was a condition between you and I that where references were made to the file as to what documents I would need, it was necessary, you being chief of the office, that I check with you as to any documents that I wanted? Wasn't that correct?

A. I cannot recall that specific conversation, Mr. Finn.

Q. Well, whether you recall the specific conversation, would that normally be the case, Mr. Bradley?

A. I wouldn't say normally, because from the time I was appointed Chief of Compliance, I had never had occasion to pull a school file in that some two months or so.

Q. Well, Mr. Bradley, whether it was a school file or any other document in the office, would it be proper and would it be according to the conduct of your office that whoever wanted any copies of anything would have to check with you first?

A. Well, I would say that that would be the normal procedure, yes.

Q. That is the normal procedure, isn't it? [654]

A. Yes.

Q. Now, you say that this document probably was, or was in the school file. Isn't it probable, Mr.

(Testimony of Edward G. Bradley.)

Bradley, that I did check with you before I got a copy of that document?

Mr. Abbott: We will object to that, your Honor, as to his feeling as to what was probable. The witness has just testified that, to the best of his recollection, no such conversation took place.

The Court: Ask if it is so. Anything might be probable.

Q. (By Mr. George C. Finn): Is it so, Mr. Bradley, that I did check with you prior to obtaining the copy of that document?

Mr. Abbott: The same objection, your Honor. The witness' testimony is that no such copy was obtained.

The Court: He may change it now. Overruled. You may answer.

The Witness: I have no recollection, Mr. Finn, of having discussed this particular document with you.

Q. (By Mr. George C. Finn): Mr. Bradley, can you positively say that it was not, or that you did not give your permission for that document, and that it was not checked with you prior to acquiring it?

A. I cannot say that.

Q. You cannot say that it was not?

A. No, sir. [655]

Q. But you cannot say that it was?

A. Yes, sir.

Q. Now, Mr. Bradley, will you refer to that document, please, and tell me what aircraft that

(Testimony of Edward G. Bradley.)

document refers to, to the best of your own knowledge?

Mr. Abbott: Objection. The document speaks for itself.

The Court: Sustained.

Mr. George C. Finn: I am asking for his knowledge. I would like to know if Mr. Bradley knows, regardless of what the document shows, whether Mr. Bradley identifies this aircraft as the aircraft in suit.

Mr. Abbott: Objection, your Honor. Mr. Bradley's identification would be immaterial.

The Court: You mean by that, has he seen it?

Mr. George C. Finn: No, your Honor. I mean by that, does he relate this document in any way to the aircraft in suit? His testimony was that he did look through the file of the Vineland School District, and I asked: Does this document relate in his mind to the aircraft in suit?

Mr. Abbott: The objection of the Government, your Honor, is that his present recollection of the document and his reading of it on the witness stand would be immaterial, and there is no foundation laid and it would be inconsistent with the prior testimony to attempt to relate it to something that occurred at that time, because he testified he did not see [656] the document in '51.

Mr. George C. Finn: Your Honor, he did so testify.

The Court: Sustained. Put your question.

(Testimony of Edward G. Bradley.)

Mr. George C. Finn: He testified he did not recall that he did see the document.

The Court: I recall the testimony. Proceed.

Q. (By Mr. George C. Finn): You did look in the file, Mr. Bradley, didn't you, the Vineland School file?

A. Only to the extent that you and I both examined the Form 65.

Q. Did you see any other document in that file, Mr. Bradley?

A. Well, there were several papers in it.

Q. Do you recall what they were?

A. I do not recall.

Q. Did you have any occasion, Mr. Bradley, to make a survey at all of any of the aircraft acquired by school districts with respect to this educational-disposal program?

A. What do you mean by "survey"?

Q. Well, you just took office, and you had never looked at any of these files prior to the time I was there, and that was in April. You took office in January. Did you make any survey at all to find out what kind of property you would have to administer, and where it was?

A. No, sir. [657]

Q. Isn't it true, Mr. Bradley, you told me you sent letters to all the various schools and that you were awaiting answers?

A. I did not send those letters.

Q. Who sent those letters, Mr. Bradley?

A. The regional offices sent the letters.

(Testimony of Edward G. Bradley.)

Q. But you had knowledge that those letters were sent? A. I beg pardon?

Q. You had knowledge that those letters were sent?

A. I don't have knowledge that any letters were sent.

Are you referring to the agreement we had with the Department of Defense to report to them any aircraft excess to educational needs for possible recapture?

Q. Mr. Bradley, I am referring to a survey which you told me was being made about the aircraft that were available in schools.

A. Yes, sir.

Q. Now, whether or not it was because of a request of the Defense Department or a request of the State Department or a request of anyone, I am not asking that question. I am merely asking, Did you make such a survey? A. Yes, sir.

Q. Did you make this survey yourself?

A. No, sir.

Q. Was the results of that survey transferred to your [658] department in any way?

A. The results of that survey did not appear prior to the time that I transferred to another job. I don't know what the results of the survey are.

Q. You had no results of that survey between April and June?

A. To my knowledge, that's right.

Q. When was the survey initiated?

A. Sometime during February, I believe.

(Testimony of Edward G. Bradley.)

The Court: Would this be a convenient time to suspend for the noon recess?

Mr. George C. Finn: Yes, sir.

The Court: We will take the noon recess at this time, ladies and gentlemen of the jury, until 1:45.

Before we separate, I would admonish you again of your duty not to converse or otherwise communicate among yourselves or with anyone else upon any subject touching the merits of this trial, and not to form or to express an opinion on the case until it has been finally submitted to you for your verdict.

I will excuse you until 1:45 this afternoon.

You may step down, Mr. Bradley.

(Thereupon the jury retired from the courtroom.)

The Court: Do you have a matter, Mr. Brett?

Before you speak, let's wait until the entire jury has [659] retired.

Mr. Brett: Your Honor, I am appearing here——

The Court: The record will show the jury has left the courtroom, and if there is nothing further, gentlemen, the case on trial will be recessed until 1:45 this afternoon.

(Whereupon, at 12:05 o'clock p.m., a recess was taken until 1:45 o'clock p.m. of the same day.) [660]

Wednesday, November 3, 1954; 2:00 P.M.

The Court: Are there ex parte matters?

Let the record show the jury are present.

Mr. Bradley was on the stand.

EDWARD G. BRADLEY

the witness under examination at the time of recess, resumed the stand and testified further as follows:

Mr. George C. Finn: Your Honor, I have found the registration certificate on N111H, and it happens to be photostated along with the bill of sale; the way my records have it. I would like to offer it for anybody that wants it.

Mr. Abbott: May we inspect the document?

The Court: You may.

Mr. George C. Finn: I haven't located the pictures yet, your Honor. I will still try to find them.

The Court: You wish the document marked for identification?

Mr. Abbott: May it be marked, your Honor?

The Court: Yes. It will be marked defendants Finn exhibit next in order for identification.

The Clerk: Defendants Finn AX for identification.

(The document referred to was marked Defendants Finn AX for identification.) [661]

The Court: That's the certificate of registration of the so-called hulk, is it?

Mr. George C. Finn: Yes, sir, the hulk.

Mr. Blackman: If the court please, during the recess, in looking over the exhibits, I found some

(Testimony of Edward G. Bradley.)

certain copies which include a copy of the registration of that particular aircraft, already marked for identification.

The Court: Well, this is another one. You might work it out with counsel during the recess. I don't see why you gentlemen can't discuss these matters.

Mr. Abbott: I am not aware that there is another copy of the document. Perhaps counsel can point it out to me.

The Court: Let's proceed now, and you gentlemen discuss it at a recess.

Proceed with your examination.

Cross-Examination
(Continued)

By Mr. George C. Finn:

Q. Mr. Bradley, you will recall that before we took a recess we were discussing a survey which you said was made on all of the aircraft contained in the schools; I believe pursuant to a request by the Defense Department or the State Department, or someone, but that your office was conducting such a survey. Do you recall that?

A. Yes, sir. [662]

Q. And you also stated, Mr. Bradley, that that survey had not been completed up until the time you left the Federal Security Agency in June of 1951, is that correct? A. That is correct, sir.

Q. Do you have any partial reports or returns at all from that survey? A. Not that I recall.

(Testimony of Edward G. Bradley.)

Q. Did you do anything of your own in your office to obtain any information in regard to that survey from anyone?

Mr. Abbott: We object to questions relating to a survey. There is no apparent materiality. We haven't objected to the first few questions, thinking Mr. Finn would not go any further into that.

The Court: What is the purpose of it?

Mr. George C. Finn: The purpose of this is to bring to the attention of the court that Mr. Bradley had charge of all of these airplanes, and we wish to lay the foundation that bringing such a matter to his attention was part of his duty, and that other matters of a similar nature should have been brought to his attention, and, if they have, what action was taken.

The Court: He isn't on trial here. Sustained. We aren't trying his office. [663]

Mr. George C. Finn: Also, your Honor——

The Court: Put your next question.

Mr. George C. Finn: In respect to the survey——

The Court: Put your next question, Mr. Finn.

Mr. George C. Finn: Yes, sir.

Q. (By Mr. George C. Finn): Mr. Bradley, did you state that the Defense Department requested or had a policy letter out where they would need these airplanes perhaps for the Korean war?

A. Yes, sir.

Q. And that was the basis upon which you said no restrictions could be removed from such air-

(Testimony of Edward G. Bradley.)

craft? A. That was one of the bases.

Q. That was one of the bases?

A. Yes, sir.

Q. Now, since these restrictions must be maintained pursuant to the necessary use of these aircraft, was it also required of you to obtain the information as to how many aircraft were available? A. Yes, sir.

Q. It was? A. Yes, sir.

Q. And was it also required of you that none of these aircraft be allowed to be disposed of because of such necessity? [664] A. Yes, sir.

Q. Mr. Bradley, do you remember when the Korean war started? A. I believe I do, sir.

Q. When was it, Mr. Bradley?

A. I believe it was in June, of 1950.

Q. June of 1950. You received this request when, Mr. Bradley?

A. The latter part of 1950, or the early part of 1951.

Q. The early party of 1951. It was approximately February, wasn't it?

A. I believe it was in January.

Q. In January? A. Of 1951.

Q. And the Korean war was going on all the time, but was there anything done by you to prevent any disposal of these aircraft at that time, subject to the requests by the Defense Department that they might be needed in the Korean war?

A. Yes, sir.

Q. What was done, Mr. Bradley?

(Testimony of Edward G. Bradley.)

A. In January of 1951 a memorandum was sent to our regional representatives, stating that we had concluded an agreement with the Department of Defense that any aircraft which had previously been transferred for educational purposes, [665] which was now no longer useful or necessary for educational purposes, should be reported to the Washington office, and that the Washington office would offer those planes to the Department of Defense for recapture in the prosecution of the Korean war.

Q. What type of aircraft was that, Mr. Bradley?

A. It did not distinguish. All types of aircraft that became excess to the needs of educational institutions would be reported.

Q. That is, whether they were tactical or transport?

A. Yes, sir.

Q. Do you understand the difference between tactical aircraft and transport aircraft?

A. I think I do.

Q. What is the difference, please?

A. Tactical aircraft is the type that carries armament, either for shooting or bombing purposes, and non-tactical I would say would be passenger or cargo type of aircraft.

Q. Mr. Bradley, was it your understanding at the time you followed these requests of the Defense Department that the scrap warranty arrangement still applied to the school aircraft?

A. Would you please repeat that?

(Testimony of Edward G. Bradley.)

Q. Was it your understanding that the scrap warranty restrictions still applied to the school aircraft at the time [666] this request was made in January, 1951? A. Yes, sir.

Q. It was your understanding?

A. Yes, sir.

Q. What is the scrap warranty, Mr. Bradley?

Mr. Abbott: We will object.

Mr. George C. Finn: As you understand it?

Mr. Abbott: That calls for this lay witness to give his opinion as to a matter not in evidence.

The Court: Sustained.

Q. (By Mr. George C. Finn): Is it not true, Mr. Bradley, that in the discussion that we had in your office in this meeting, that we brought up the point of reducing the airplane to its basic material content? Was that point discussed, Mr. Bradley?

A. Yes, it was.

Mr. George C. Finn: It was, wasn't it?

The Court: Did you intend to ask him what he meant when he referred to a scrap warranty? Is that what you meant to ask him?

Mr. George C. Finn: Yes, sir.

The Court: You may ask him that.

Q. (By Mr. George C. Finn): What did you mean, Mr. Bradley, by the scrap warranty?

A. When the plane was unfit for educational purposes, [667] that it should be reduced to scrap, and that it would have no further use except for its basic material content.

(Testimony of Edward G. Bradley.)

Q. What do you mean by basic material content, Mr. Bradley? What is your meaning of that?

A. It is the metal.

Q. The metal? A. In the plane.

Q. Any of the component materials of the airplanes; is that correct?

A. I don't follow you, Mr. Finn.

Q. That is, any of the basic materials of the airplane—aluminum, iron, copper——

A. Yes.

Q. ——or whatever went into its manufacture?

A. Yes.

Q. Mr. Bradley, isn't it a little inconsistent with your contention that these airplanes be reduced to their basic material content, scrap metal, and so forth, and that they were needed for the demands of the Air Force in the Korean war?

The Court: Objection sustained. Put your next question. If counsel are too lazy to make their objections, I will make my own objection. Sustained.

Q. (By Mr. George C. Finn): I will put it to you another way, Mr. Bradley: Did you do anything to prevent any [668] school from reducing any airplane to its basic material content?

Mr. Abbott: Objection, your Honor, as immaterial.

The Court: Sustained. We are not going to try the War Assets Administration. We are trying this case. It doesn't make any difference whether he did it rightly or wrongly. What we are interested in

(Testimony of Edward G. Bradley.)

is what he did. The point of fact of a policy, we are not concerned with the policy.

Q. (By Mr. George C. Finn): Mr. Bradley, you did tell me I couldn't fly this airplane because it was perhaps required under the requirement of the Defense Department, that it would be required for the Air Force; is that right?

A. No, sir. I said you could not fly the plane because the plane had been transeferred to the school for non-flight purposes, and, according to the conditions which the school signed, that when it became unfit for educational purposes it would have to be reduced to scrap.

Q. That is right.

A. That was the reason I told you that you could not fly the plane.

Q. But didn't you, Mr. Bradley, also tell me that those restrictions could not be removed because the airplane may have been required by the Defense Department?

A. No, sir.

Q. You didn't? [669]

A. There were two——

Q. Wasn't this policy letter—wasn't this a policy——

Mr. Abbott: May the witness be permitted to complete his answer?

Mr. George C. Finn: Pardon me.

The Court: You may complete your answer.

The Witness: The policy that was established toward recapture of planes was a part of our program to try to get for the Department of Defense

(Testimony of Edward G. Bradley.)

any airplane that had any value that they could use. We would submit those to the Department of Defense. They would send inspectors to where they were located, and they would report as to whether they felt that there was anything that they could use.

Q. (By Mr. George C. Finn): Well, didn't you say, Mr. Bradley, that that was the basis upon which you stated no restrictions could be removed?

A. I stated that no restrictions would be removed, basically, because of the conditions contained on the Form 65.

Q. I agree with that, but, also, wasn't it because of this policy letter? Didn't you just testify to that? Because this policy had been established that no restrictions could be removed?

A. The policy had been established that no restrictions—that we would not remove restrictions, and one of [670] the considerations was because of this agreement with the Department of Defense, that we would not transfer or permit any transfers of educational planes to commercial users until the Department of Defense had had a chance to screen that material. That was one of the considerations which probably strengthened our policy on not removing restrictions on educational planes.

Q. I agree with you, Mr. Bradley. Now, had no restrictions been removed, then the planes would have been reduced to their basic material content, would they not?

(Testimony of Edward G. Bradley.)

Mr. Abbott: Objection, your Honor. That is argumentative and speculative.

The Court: Sustained. [671]

Q. (By Mr. George C. Finn): What would have happened to an airplane if you had not removed any restrictions on it, if the school wishes to dispose of it?

Mr. Abbott: Same objection. It calls for speculation on the part of the witness what the school might have done.

The Court: Sustained.

Q. (By Mr. George C. Finn): What is your contention, Mr. Bradley——

Mr. Abbott: Same objection.

The Court: Sustained.

Mr. George C. Finn: I haven't finished.

Q. (By Mr. George C. Finn): ——as to the proper disposal of an aircraft by a school when it was no longer required for use?

Mr. Abbott: Objection, your Honor. The statute and the regulations and the agreement——

The Court: It doesn't matter what he thought about it, Mr. Finn. Sustained.

Mr. George C. Finn: All right, your Honor.

Q. (By Mr. George C. Finn): This policy that you speak of, Mr. Bradley, upon which you base one of the reasons for not removing any restrictions, was that a written statement to your office? Did you see any policy letter of that kind?

A. That was based upon discussions that we had

(Testimony of Edward G. Bradley.)

had with the Department of Defense and representatives of the Air Force [672] and the Navy.

Q. It was a discussion and wasn't written?

A. That is right. It was not a written agreement.

Q. Who established the policy? I mean, how did you know about it? Is this the normal procedure, where some Air Force man comes to your office and says, "We would like you not to do certain things, and we think this is the policy you should follow," and he leaves and you follow that?

Mr. Abbott: Objection, your Honor. The normal procedure is immaterial.

The Court: Sustained.

Q. (By Mr. George C. Finn): To your knowledge then, there was no written policy?

A. There was no written policy with respect to the recapture of aircraft for Department of Defense use.

Q. And there was nothing——

A. We established a written policy and circulated it to our representatives in the regions and the state agencies, the surplus property state agency people.

Q. Did that policy include any statement that aircraft should not be reduced to their basic material content? A. No.

Q. It did not? A. No.

Q. And this policy of recapture, Mr. Bradley, do you [673] have any knowledge of any aircraft that were recaptured?

(Testimony of Edward G. Bradley.)

Mr. Abbott: Objection, your Honor.

The Court: Sustained. Mr. Finn, these people had only such authority as Congress gave them. If Congress said, "Take them all and blow them up," that would have been their legal duty. Even if they made an order next day to build some more, that would have been their duty.

Mr. George C. Finn: I agree with that, your Honor. But when I went into this man's office I heard expressions of impossibility, these were essentially obstacles——

The Court: You hear anything in Washington. You don't assume these people are all happy, either.

Mr. George C. Finn: That is for sure. Thank you, your Honor.

Q. (By Mr. George C. Finn): Now, Mr. Bradley, as part of your testimony, you stated that the State Department did not wish these airplanes to be flown out of the country and used by any foreign country that were then adverse to the United States' interests, is that correct?

A. That is correct.

Q. Did you ever hear of Proclamation 2776?

A. I can't say that I have heard of that.

Q. But you did state that it made no difference what type of aircraft it was, tactical or transport, that the restrictions by the State Department were to be adhered to, [674] isn't that correct?

A. Yes.

Mr. Abbott: I object to that. It constitutes an erroneous——

(Testimony of Edward G. Bradley.)

The Court: It would be immaterial. If this were a congressional committee you were before that would all be very pertinent. We have to take the law as Congress makes it.

Q. (By Mr. George C. Finn): How long have you been in this courtroom, Mr. Bradley?

A. Today?

Q. Just today?

A. I asked you, you mean today?

Q. Since you arrived here in this city, how long have you been in this courtroom?

A. I believe I attended the court on, I believe it was Thursday, for the first time.

Q. Did you hear the testimony of Mr. Duly?

A. I believe I recall him being on the stand. I don't know whether I was here during all of his testimony. I didn't attend from the opening to the end of each day's session.

Q. Do you recall Mr. Duly testifying that these airplanes, these C-46s, were purchased in this country and sold in South America at an additional profit? [675]

Mr. Abbott: I object, your Honor. Whether the witness heard Mr. Duly or not is immaterial.

The Court: Sustained.

Q. (By Mr. George C. Finn): Do you have any knowledge, Mr. Bradley, of your own, or from this courtroom or otherwise, that some of these airplanes have been sold out of the country?

Mr. Abbott: I object, your Honor. It is immaterial.

(Testimony of Edward G. Bradley.)

The Court: Sustained.

Q. (By Mr. George C. Finn): Isn't it true, Mr. Bradley, just between you and I——

The Court: It can't be that way. This is a public trial.

Q. (By Mr. George C. Finn): Well, when I was in your office, the best and easiest way to handle this problem when I first presented it to you was to make these statements that the Defense Department was going to pick up the airplanes for the Korean War, that the restrictions were on them and nobody could buy them, and that you couldn't acquire title and nobody would allow them to be registered and couldn't fly them anyway if you did buy them—isn't it true that that was the first best way to solve that problem when I first presented it to you?

Mr. Abbott: I object, your Honor, as improper to form, and immaterial.

The Court: Even if he thought so, it wouldn't matter. [676] If he agreed wholeheartedly, it wouldn't matter. If Congress should say there should be established a plant out here right across from one of the aviation plants to destroy the same model plane while the aviation plant is making it, it would still be the law, and if it came into this court, the court would be required to enforce the law. You may call it ridiculous and any other adjective, but still it would be the sworn duty of this court to uphold the law.

So we are not concerned with what would be the

(Testimony of Edward G. Bradley.)

best way. A congressional committee would, but this is a court of law.

Mr. George C. Finn: We have here a question of estoppel. We have here a question of, first, we hear all kinds of negative answers, that this can't be done, and then gradually these are broken down step by step, one by one, until there is no problem at all, until there are no restrictions on the plane.

The Court: This witness can only testify to what he knows. Ask him questions about what you think he knows. He has been on the stand about four hours, I think, now, and it is about time to bring this to a conclusion.

Mr. George C. Finn: Your Honor, if this gentleman acquiesced to the situation as we all discussed it, and it was proper and official and legal, then it points to estoppel on the part of the Government.

The Court: Those "ifs" are very tall "i's" and "f's." [677]

Mr. George C. Finn: But the Government proposes, your Honor, that immediately——

Mr. Charles C. Finn: May I do a little whispering?

The Court: To your brother?

Mr. Charles C. Finn: Yes. I think I can get him back on the track.

Mr. George C. Finn: The Government proposes these were impossible restrictions that couldn't be overcome, and that I should have known better, was my reasoning from the testimony that is presented here.

(Testimony of Edward G. Bradley.)

The Court: Mr. Finn, the Government concedes that officials empowered by Congress have the power to waive or release these restrictions. Is that correct, Mr. Abbott?

Mr. Abbott: No question about it, your Honor.

The Court: But this witness says that he had no power. He knows his duties. He said he had no power to waive them. Am I correct?

The Witness: Yes, your Honor.

The Court: Or, he had no power to release them. It took a man superior in authority to him to do it. So it doesn't matter whether it is the best way or the wisest way. The question is what did they do.

Mr. George C. Finn: Your Honor, he claims to have the power to impose them.

The Court: Oh, no question about that. [678]

Mr. George C. Finn: Has the power to impose——

The Court: Has to power to enforce, that is.

Mr. George C. Finn: That is what I am getting at. If he has the power to enforce—on what basis? And he states basis of national defense——

The Court: It doesn't matter. You had just as well ask the policeman on the beat by what virtue does he keep the peace. He has the power to enforce the law, but does he have the authority to repeal the law, to wipe it out, to say to that man, "You may do it," and to another, "You may not." No, the policeman on the beat has no such power, and yet he is an enforcer. And this witness, as I under-

(Testimony of Edward G. Bradley.)

stand, was an enforcer of compliance. Is that correct?

The Witness: That is correct, sir.

The Court: Proceed.

Q. (By Mr. George C. Finn): Mr. Bradley, to your knowledge was any school plane ever sold while you were in office, in that position?

Mr. Abbott: I object, your Honor. It is immaterial whether it occurred or not.

The Court: Overruled. You may answer.

The Witness: I do not recall any plane being sold from the time that I was in the compliance section.

The Court: You were called upon to answer yes or no. Could you answer it yes or no? [679]

The Witness: Since I have no recollection of that event, I would have to say no, your Honor.

Q. (By Mr. George C. Finn): Mr. Bradley, you stated that, in this conversation in this meeting which we had with the Civil Aeronautics Administration and the Federal Security Agency, that the attorneys of the Federal Security Agency took issue with the attorneys of the Civil Aeronautics Administration.

What do you determine they took issue over?

A. Would you repeat that, please?

Q. What was the issue, Mr. Bradley, between those two sets of attorneys?

A. As I recall it, I don't believe that the Federal Security Agency lawyers were in complete agreement with the Civil Aeronautics Administra-

(Testimony of Edward G. Bradley.)

tion people on the matter of title. Now, I am not a lawyer and I cannot give you the specific issues, but I know that, as I recall it, our attorneys did not agree with the Civil Aeronautics Administration attorneys.

The Court: As to fact or as to law?

The Witness: I believe it was a legal question, your Honor.

Q. (By Mr. George C. Finn): I am not asking you as to which issue was resolved one way or what issue was resolved another way. What was the point, or points involved over which they took issue? [680]

The Court: Do you know what they were? Do you want a certain answer? Why don't you ask him if it is a fact?

Q. (By Mr. George C. Finn): Isn't it a fact, Mr. Bradley, that there were several issues involved here, in fact there were three? Isn't it a fact that one of them was a statute of limitations as to the right of the school to dispose of airplanes after three years of acquisition? Wasn't that one point?

A. That was discussed.

Q. And, Mr. Bradley, wasn't there another point concerning what scrap, whether the plane would have to be reduced to its basic material content, or whether it would be scrapped as unsalable for commercial use, or classified as scrap, or actually have the characteristics of basic material? Wasn't that one of the issues?

A. That was discussed, yes.

(Testimony of Edward G. Bradley.)

Q. And isn't it true, Mr. Bradley, that another issue was this sales receipt form, as to whether or not it constituted a formal bill of sale?

A. I cannot recall that that was ever mentioned at that meeting.

Q. Mr. Bradley, was the file available to all of us at that point?

A. The file was not examined by anybody at that meeting.

Q. You didn't produce the file at all? [681]

A. I may have had it on the desk. But the file itself was not a subject of discussion. I believe there were copies of the Form 65 circulated, and the Regulation 4 was in evidence. But I cannot recall that the Vineland School file itself was passed from hand to hand, or examined in detail by anybody at that meeting.

Q. Nobody was hiding anything, were they, Mr. Bradley?

A. No, sir.

Q. Everything was open and aboveboard, all the cards on the table, Mr. Bradley?

A. Yes, sir.

Q. There was no attempt at any surreptitious behavior on the part of any individual there, was there?

A. That is correct.

Q. Don't you recall, Mr. Bradley, that the file was available and we had access to all these documents to bring up these points as to the issues that were involved, these three issues?

A. I do not recall that, Mr. Finn.

Q. Were you involved in these documents your-

(Testimony of Edward G. Bradley.)

self? Did you partake in this discussion between the two sets of attorneys and myself?

A. I took very little part in that meeting. I believe I have stated that before.

Q. This was more or less a technical discussion with [682] a layman trying to bring out points of law to two sets of attorneys, was it not? I being the layman?

A. I don't know what you mean by the "layman."

Q. I being the layman. I was not an attorney, but the other four people were.

Mr. Abbott: We object to that as assuming facts not in evidence. There was but one lawyer from the Civil Aeronautics Administration, Mr. Howard.

The Court: The meeting has been fully described.

Mr. George C. Finn: Pardon me. There is one point that hasn't been described.

The Court: Proceed to that point.

Q. (By Mr. George C. Finn): You didn't enter into any of these technical discussions about the relationships——

The Court: He has been over all that.

Q. (By Mr. George C. Finn): Did you, Mr. Bradley?

The Witness: Would you mind finishing that?

The Court: I can answer it for him, Mr. Finn. He said no several times. Proceed to the next question.

Q. (By Mr. George C. Finn): Did you actually

(Testimony of Edward G. Bradley.)

sit back a ways and allow this discussion to go on without paying too much attention to the technicalities? A. I did not participate.

Q. Thank you.

A. Because it was in a field in which I have no competence. [683]

Q. Was it possible, Mr. Bradley, for this sales receipt to be discussed without you really knowing anything technically about it?

Mr. Abbott: I object, your Honor. The question doesn't identify the document.

The Court: Sustained.

Mr. George C. Finn: May I identify the document?

The Court: It has been asked and answered. Haven't you asked him that?

Mr. George C. Finn: I don't think anybody asked him if it is possible that sales receipt——

The Court: Anything is possible. I could answer that for him. Anything is possible.

Mr. George C. Finn: Without his knowledge about it.

The Court: Is it possible for some other document to have been discussed without your knowing about it?

The Witness: It is possible, your Honor, yes.

Mr. Charles C. Finn: May I interject here, your Honor? I think—I believe that the witness stated that the sales receipt was not in evidence at the discussion. I think there was a definite statement to that effect.

(Testimony of Edward G. Bradley.)

The Witness: I said I had no recollection of a sales document being discussed at that meeting.

The Court: Or being in evidence. [684]

The Witness: Or of being in evidence. And your Honor asked me if it would be possible if I would have a recollection. I said I could not recall.

Q. (By Mr. George C. Finn): But do you recall that it was not there?

A. But it could have been discussed without me knowing it. That is possible.

Mr. George C. Finn: Thank you, Mr. Bradley.

Mr. Charles C. Finn: May I ask, that he either knew or did not know of his own knowledge there was such a sales receipt at that meeting?

The Court: You have heard his answer.

Mr. Charles C. Finn: It wasn't express. He said he had no—well, that is right.

Q. (By Mr. George C. Finn): Mr. Bradley, did we also discuss the policy letter or a policy letter between the Federal Security Agency and the Civil Aeronautics Administration at that meeting?

A. We did not discuss a policy letter, to my recollection, at all.

Q. Do you recall my making a statement, "Gentlemen, make up your mind whether you are going to follow the regulation or policies or agreement, or what"? Do you remember such a statement, Mr. Bradley?

A. I cannot recall that statement, Mr. Finn.

Q. Can you say that it was not made?

A. I can't say that it was, or that it was not.

(Testimony of Edward G. Bradley.)

Q. Thank you. Who took your place, Mr. Bradley, when you were relieved?

A. A man by the name of Lawrence took over my duties when I left. As a matter of fact, when I left, the position was split into two parts. I was handling not only the aircraft disposals, but also all personal property compliance matters, and all real property compliance matters.

When I left the real property compliance matters were handled by a gentleman who handled real property disposals, and a gentleman by the name of Lawrence, William Lawrence, handled the personal property and aircraft compliance matters.

Q. Do you know Mr. Frazier? A. I do.

Q. What was Mr. Frazier's position, Mr. Bradley?

A. Mr. Frazier is chief of the Surplus Property Utilization Division.

Q. Did you ever discuss this case with Mr. Frazier? A. I don't believe I did.

Q. At no time?

A. I did not discuss this case with Mr. Frazier between January of 1951 and June of 1951. My immediate supervisor was Mr. Baxter. Mr. Baxter was the chief of the Surplus Property Utilization Division. [686]

Q. Did Mr. Frazier ever ask you for any information concerning this case, the disposal of this subject aircraft in suit?

A. When Mr. Frazier took over the position as director or chief of the Division, he did ask me what

(Testimony of Edward G. Bradley.)

took place at some of the meetings that took place—some of the meetings that we had in connection with this request of yours for clearance of the restrictions.

Q. When did Mr. Frazier ask you about this?

A. Well, probably the latter part of 1951, I believe.

The Court: Had you discussed it with Mr. Baxter before that?

The Witness: Yes, sir.

The Court: On more than one occasion?

The Witness: I reported verbally to Mr. Baxter each meeting with Mr. Finn.

Q. (By Mr. George C. Finn): You say the latter part of 1951. Were you then in your position—you were not then in your position as—

A. No, sir, I was with another program at the time.

Q. And Mr. Frazier looked you up, did he, and asked you about this?

A. I think that is a good description.

The Court: What did he say to you about it?

The Witness: Well, he wanted to know what conclusion—— [687]

The Court: Did he say how he happened to inquire?

The Witness: Well, because Mr. Frazier had taken over the position as chief of the Division.

The Court: Chief of what division?

The Witness: Chief of the Surplus Property Utilization Division.

(Testimony of Edward G. Bradley.)

The Court: And he had just taken that position over?

The Witness: Yes, sir.

The Court: What had been his position previously?

The Witness: Well, he was working in the Surplus Property Division, but he was not chief of the Division.

The Court: Was he superior to Mr. Baxter?

The Witness: No, sir, he was under Mr. Baxter.

The Court: So when you reported to Mr. Baxter, you were reporting to——

The Witness: To my superior.

The Court: And his office was what?

The Witness: He was chief of the Surplus Property Utilization Division.

The Court: And then Mr. Frazier succeeded to what?

The Witness: Mr. Frazier succeeded to chief of the Surplus Property Utilization Division when Mr. Baxter transferred to another program.

The Court: And Mr. Frazier looked you up?

The Witness: Yes, sir. [688]

The Court: Did he tell you why he happened to be inquiring about this transaction?

The Witness: Well, I think that it came about as a result of a newspaper article that appeared with respect to this aircraft. I am not real sure of that. But he did inquire as to what the conversations were with respect to "your meetings" in Washington with me, and also with the legal people

(Testimony of Edward G. Bradley.)

from the Federal Security Agency and from the Civil Aeronautics Administration.

The Court: Did he say anything to you about the registration of the aircraft at that time?

The Witness: Yes, sir, he told me that the plane had been registered.

The Court: By the Civil Aeronautics Administration?

The Witness: Yes, sir.

Q. (By Mr. George C. Finn): What did you say to him, Mr. Bradley?

A. Well, frankly, I can't recall what I said to him.

The Court: You reported to him what you knew at the time of what had transpired?

The Witness: I gave him a summary of what took place at the meeting with Mr. Finn and myself, and in the meeting of the lawyers when Mr. Finn was present.

Q. (By Mr. George C. Finn): You reported this meeting we had prior to the airplane being registered, and told him [689] the whole story about that meeting; is that right?

A. As closely as I could.

The Court: Now, do you want to ask him what he said?

Mr. George C. Finn: Yes.

The Court: About anything he intended to do about it after he knew the airplane was registered?

Mr. George C. Finn: Yes.

The Court: That is your question. Ask him.

(Testimony of Edward G. Bradley.)

Q. (By Mr. George C. Finn): Specifically, what did you say to Mr. Frazier, and what did he say to you as to what he might do?

The Court: Let's not be that broad. Let's pin it down.

Q. (By Mr. George C. Finn): What did you say to Mr. Frazier?

The Court: No, the important thing is what did Mr. Frazier say to him.

Q. (By Mr. George C. Finn): All right. What did Mr. Frazier say to you?

The Court: As to what he intended to do about this airplane, knowing that it had been registered as a commercial aircraft by the Civil Aeronautics Administration.

Mr. George C. Finn: I will adopt that question of the court. Please answer it.

The Witness: Mr. Frazier, as I recall it, said that he was forwarding the matter to the legal division, and asking [690] that they take appropriate action in the case—the legal division of the Federal Security Agency.

Q. (By Mr. George C. Finn): Did he state what appropriate action he meant?

A. No, I don't think he did, because the appropriate action——

The Court: No, not what you think. It would be what he said.

The Witness: No, he did not clarify the term "appropriate action."

Q. (By Mr. George C. Finn): And this meet-

(Testimony of Edward G. Bradley.)

ing took place in the latter part of 1951; is that correct? A. Some time along in there.

Q. Did you have any further discussion with Mr. Frazier regarding this matter?

A. I don't believe so. I didn't see Mr. Frazier very often. I was in another part of the building, and I was not in the program any longer.

The Court: Did you ever discuss this matter with anyone superior to Mr. Frazier?

The Witness: No, sir.

Q. (By Mr. George C. Finn): Did you discuss this matter with the Justice Department, after it had been referred to them, or prior to that?

A. No, sir. [691]

Q. You had never discussed this matter at all with any member of the Justice Department?

A. I have never discussed this matter with anybody in the Justice Department until one week ago, when I came to Los Angeles.

Q. Did you discuss this matter with any other department of the Government, or any other related department of the Government, in regard to this aircraft in this suit? A. No, sir.

Q. Did you ever make an affidavit, Mr. Bradley?

A. Yes, sir.

Q. When did you make the affidavit?

A. I believe it was sometime in 1952.

Q. Can you give me the approximate time?

The Court: Do you have the affidavit?

Mr. George C. Finn: I don't have the affidavit,

(Testimony of Edward G. Bradley.)

your Honor. I just know about it. It was read by the plaintiff while I was on cross-examination.

The Court: Do you have the affidavit to which he refers, Mr. Abbott?

Mr. Abbott: I have in my office an affidavit executed by the witness, your Honor.

The Court: Do you wish it?

Mr. George C. Finn: May I have it, your Honor?

The Court: Yes, it will be produced. Let's finish with [692] this witness. We will be here another week if this keeps up.

Mr. George C. Finn: This witness is important, your Honor.

The Court: All witnesses are important. Proceed.

Q. (By Mr. George C. Finn): Mr. Bradley, this was, you say, in June of 1952?

A. It was—I believe it was in May, of 1952.

Q. In May?

A. I am not—I believe Mr. Abbott has a copy of it.

Q. What caused you to make this affidavit, Mr. Bradley?

A. One of the lawyers in the Federal Security Agency suggested that it might be well that I refresh my memory about what occurred during the various meetings that took place, and that I set forth my recollection of those meetings in the form of an affidavit, and I did that. [693]

Q. What lawyer, Mr. Bradley?

(Testimony of Edward G. Bradley.)

A. I don't recall the name of the lawyer, Mr. Finn, I am sorry.

Q. You don't recall his name, but do you know for certain that he was a member of the Federal Security Agency?

A. Yes, he was in the legal division of the Federal Security Agency.

Q. Had you known him before that?

A. Yes.

Q. Was he a member of the forty attorneys you had with the Federal Security Agency?

A. He was a member of the legal division of the Federal Security Agency.

Q. But it was not Mr. Hiller or Mr. Davidson?

A. No, it was not.

The Court: Has the Government furnished you with the affidavit——

Mr. George C. Finn: Yes, your Honor.

The Court: ——made by the witness, or a copy of it?

Do you wish to offer it in evidence?

Mr. George C. Finn: First, your Honor, I wish to see a point here.

Q. Mr. Bradley, did you ever make the statement in an affidavit or to anyone that I offered you \$2,000, two to three thousand dollars, to obtain a sales receipt from you? [694] A. Yes, sir.

Mr. Abbott: Objection, your Honor. The inquiry is improper unless the document to which Mr. Finn refers is placed before the witness.

Mr. George C. Finn: Your Honor, I don't know

(Testimony of Edward G. Bradley.)

whether this is the document or not. It is an original. On the first page——

The Court: The witness testified this morning something about an offer to pay the Government two or three thousand dollars, didn't he?

Mr. George C. Finn: Your Honor, there is a question about that. He did testify to it, and I remember his words precisely. First, I must find the affidavit, and the first statement he made as to such a thing——

The Court: Why do you need the affidavit unless it is inconsistent with the affidavit?

Mr. George C. Finn: It is inconsistent, but I need the affidavit to bear it out.

The Court: Do you have another affidavit?

Mr. Abbott: Your Honor, I have just given to Mr. Finn the only affidavit by the witness which I know of. If Mr. Finn believes there is another affidavit, he can ask him.

Q. (By Mr. George C. Finn): Let me ask you, Mr. Bradley, did you sign any affidavit in the original?

The Court: Let's ask him first if he made more than one [695] affidavit connected with this case.

Q. (By Mr. George C. Finn): Did you make more than one affidavit, Mr. Bradley?

A. No, sir.

Q. You haven't made more than one. The affidavit which you did sign, Mr. Bradley, where was that signed?

A. It was signed in Washington.

(Testimony of Edward G. Bradley.)

Q. Was it acknowledged?

A. What do you mean by "acknowledged"?

The Court: If it weren't, it would not be an affidavit.

Q. (By Mr. George C. Finn): Was it sworn—
acknowledged by a notary? A. I don't know.

Q. Do you recollect a notary acknowledging your signature?

The Court: Let's not waste any time with that sort of thing.

Mr. George C. Finn: Your Honor, this is important.

The Court: If it were not subscribed and sworn to before a notary, it would not be an affidavit. It would be a simple statement.

Mr. George C. Finn: Maybe that is what it is.

The Court: If it isn't here——

Mr. George C. Finn: I have an affidavit here.

The Court: Then put it before the witness, if you wish, [696] and ask him a question about it.

Mr. George C. Finn: Your Honor, I would like to ask him what he knows.

The Court: If he made an affidavit, that means he signed something and swore to it before a notary public.

Q. (By Mr. George C. Finn): Mr. Bradley, was that an original typewritten copy, or was it a carbon copy, or was it an original?

Mr. Abbott: May it please the court: I have given Mr. Finn a copy. It may be a duplicate-original. I went over to see, and he doesn't desire me

(Testimony of Edward G. Bradley.)

to see it. I don't know, and it may be a duplicate-original, and it may be only a carbon copy. If the original document itself is important, it is in my office, and I will bring it down.

Mr. George C. Finn: Your Honor, that is what I am asking for.

The Court: If there is anything on it that amounts to anything, let's have it. Counsel is willing to stipulate it is a copy of the original, and you can proceed just as well as though you had the original before you.

Mr. George C. Finn: Your Honor, I do not stipulate that this is a copy of the original.

The Court: Then get the original.

Mr. George C. Finn: Fine. I would like to have the original because, as the original was read to me—— [697]

The Court: Now, you will continue. Send for the affidavit immediately, Mr. Abbott.

Proceed with the examination.

Mr. Abbott: May I examine the document Mr. Finn has, to see if it is a duplicate-original? It may be.

The Court: You may.

Proceed, Mr. Finn.

Mr. Abbott: It appears to be a duplicate-original.

The Court: If you would show it to the witness, perhaps that would expedite the matter.

Mr. George C. Finn: Your Honor, I have a

(Testimony of Edward G. Bradley.)

purpose for not showing it to the witness at the moment.

The Court: Very well. Put your next question. Let's proceed with the examination.

Q. (By Mr. George C. Finn): Mr. Bradley, did you ever see a policy letter regarding the disposal of school aircraft between the Federal Security Agency and the Civil Aeronautics Administration?

A. No, sir, I never saw a policy letter.

The Court: "No, sir," is the answer, is that it?

The Witness: Yes, your Honor.

The Court: Make the answers just as short as possible, and we will get along faster, Mr. [698] Bradley.

Mr. George C. Finn: May I have the policy letter which was submitted to me on the witness stand?

The Court: I haven't seen any. What exhibit is it you are speaking of?

Mr. George C. Finn: The plaintiff produced two letters which the clerk separated, one of them allegedly a policy letter.

The Court: Is there any such exhibit, Mr. Abbott?

Mr. George C. Finn: Relating to the Civil Aeronautics Administration.

Mr. Abbott: There is a document——

The Court: Find it, and let's move along.

Mr. Abbott: ——Plaintiff's Exhibit 11, a letter

(Testimony of Edward G. Bradley.)

dated January 2, 1952, to which Mr. Finn may be referring.

The Court: I am going to conclude this examination very rapidly, gentlemen, so you had better get your questions in order. This isn't going on but ten minutes longer.

Mr. George C. Finn: Your Honor, this goes to the credibility of the witness.

The Court: Proceed. If you are going to be a lawyer, what I am going to have to do is to treat you at least half way as I would any other lawyer. I can't give you over twice as much latitude as I would give a lawyer. Now put your next question.

Mr. George C. Finn: I wanted these [699] documents.

The Court: What are the exhibit numbers, Mr. Abbott?

Mr. Abbott: Of the document being examined by the witness?

The Court: That is what we are speaking of, isn't it?

Mr. Abbott: 11, your Honor. Plaintiff's 11.

The Court: Do you have Exhibit 11 before you, Mr. Bradley?

The Witness: Yes, sir.

The Court: Have you examined it?

The Witness: Yes, sir.

The Court: What is your question about?

Q. (By Mr. George C. Finn): Mr. Bradley, have you ever seen that letter? A. No, sir.

Q. Did Mr. Frazier in his conversation ever re-

(Testimony of Edward G. Bradley.)

fer to that letter? A. No, sir.

Q. Was that letter—you can examine the date on it, Mr. Bradley, and the context of it—to your knowledge, did such a policy exist between your agency and the Civil Aeronautics Administration at the time you were the compliance officer?

A. Would you please repeat the question?

The Court: When you were in the office, did such a policy exist, as expressed in that letter, Exhibit 11, if you [700] know?

The Witness: Yes, sir; such a policy did exist.

Q. (By Mr. George C. Finn): Was that policy in that letter, Mr. Bradley? Was that letter the policy upon which you base your answer?

A. Not this letter, no, sir.

Q. Not that letter? A. No, sir. [701]

Q. What letter do you base your answer on, Mr. Bradley?

Mr. Abbott: Objection. It assumes a fact not in evidence.

The Court: Sustained. He hasn't said there was such a letter.

Q. (By Mr. George C. Finn): Mr. Bradley, was there a letter establishing such a policy, to your knowledge?

A. I do not know that there was a letter.

Q. How was the policy established?

The Court: He has testified it was established by agreement between the departments. You have been into once, and you asked him if a representative of the Air Force, or some division of the Gov-

(Testimony of Edward G. Bradley.)

ernment, walked through and said, "Do you want to do so and so? And you are going to do so from now on." We have been over that since lunch.

Mr. George C. Finn: That was a different policy, your Honor, established by the Defense Department for the recapture of aircraft.

The Court: Is this a different policy?

Mr. George C. Finn: Yes, sir.

The Court: Very well. I am sorry. Go ahead.

Q. (By Mr. George C. Finn): This particular policy, Mr. Bradley, how was it established?

A. It was established by a verbal agreement between the Office of Education in the Federal Security Agency and [702] the Civil Aeronautics Administration.

Q. Who in that agency, Mr. Bradley, to your knowledge, established such a policy. How did it come about?

A. I don't know. I didn't work for the Office of Education. I knew they had an agreement of some months standing with the Civil Aeronautics Administration, that CAA would not register educational aircraft.

Q. You knew, however, that such a policy existed, that they would not register school aircraft at the CAA? A. Yes, sir.

Q. Is there any reason for such a policy, Mr. Bradley?

Mr. Abbott: Objection, your Honor. The reason is immaterial.

The Court: Sustained.

(Testimony of Edward G. Bradley.)

Q. (By Mr. George C. Finn): Upon what would you base the necessity of such a policy, Mr. Bradley?

Mr. Abbott: The same objection, your Honor.

The Court: Sustained.

Q. (By Mr. George C. Finn): Do you know for a fact, Mr. Bradley, that such a policy existed?

A. Yes.

Q. How do you know?

A. By conversation with the Office of Education people.

Q. Pardon?

A. In conversation with people in the Office of Education [703] at that time, who were charged with requirements for compliance of educational aircraft.

Q. You said "people." Who were they, Mr. Bradley?

A. Well, one gentleman had charge of that in the Office of Education.

Q. What was his name?

A. His name was Colonel Dunn.

Q. Was Colonel Dunn with the Agency when you were in your office, in that branch?

A. Yes, he was with the Office of Education. That is a constituent agency of the Federal Security Agency.

Q. Did Colonel Dunn ever discuss this policy with you, Mr. Bradley?

A. To which policy are you referring?

(Testimony of Edward G. Bradley.)

Q. This policy whereby the Federal Security agreed with the CAA that they would not register any school airplanes?

A. Yes, he did discuss that.

Q. He discussed it with you? A. Yes.

Q. What was that discussion, Mr. Bradley?

A. Colonel Dunn related to me that the Office of Education felt that school aircraft, because of the restrictions, should not be flown, and that when they had served their purpose they should be scrapped, and he said in view of [704] that the Office of Education had come to a verbal agreement with the Civil Aeronautics people that CAA would not register any educational planes.

Q. Did you ever discuss this agreement with the Civil Aeronautics Administration?

A. I don't believe I did.

Q. Do you know who in the Civil Aeronautics Administration established the policy on their side?

A. I don't know. This was a conversation between Colonel Dunn and the CAA, to which I was not a party.

Q. Do you know that the Civil Aeronautics Administration agreed with Colonel Dunn?

A. They did, yes.

Q. How do you know that, Mr. Bradley?

A. Because CAA referred you to the Federal Security Agency when you went to get a registration.

Q. Is that the only knowledge you have that they agreed not to register the plane?

(Testimony of Edward G. Bradley.)

A. It is the only concrete knowledge I have.

Q. Isn't that an assumption, Mr. Bradley, on your part?

The Court: Argumentative. Sustained. I give you two more minutes on this examination.

Mr. Charles C. Finn: May I——

The Court: You may. The only reason I limit you is we are just getting nowhere. [705]

Mr. George C. Finn: I have a point here, your Honor, which I wish to bring out.

The Court: Ask him a question. You are asking the witness what the truth as to facts is, and you don't have to be clever about it. Just ask him as to the facts.

Mr. George C. Finn: I am not being clever, your Honor. I am just asking——

The Court: I mean, if you want to bring it out, ask him a question about it.

Mr. George C. Finn: Mr. Bradley, in this meeting we had in your office you stated that the Civil Aeronautics attorney and the registrar of aircraft were present; is that correct?

A. That is correct.

Q. And that the attorney stated that the Finns had a registerable interest in the aircraft?

Mr. Abbott: Objection, your Honor, unless Mr. Finn will clarify which attorney is identified.

Mr. George C. Finn: Mr. Howard, the Civil Aeronautics attorney.

The Witness: Mr. Howard did make that statement.

(Testimony of Edward G. Bradley.)

Q. (By Mr. George C. Finn): He made that statement, and at that time you knew of the policy not to register an aircraft; is that correct?

A. Yes, sir. [706]

Q. Mr. Bradley, can you tell me why the policy was not followed?

A. No, I can't tell you why.

Q. Wasn't it, Mr. Bradley, because of the discussion that we had in your office with your agency and the Civil Aeronautics Administration present? Wasn't that the reason they registered the airplane?

A. You will have to give me more on that, Mr. Finn. I don't believe I quite understand what you want.

Q. You will admit the policy was not followed; the Civil Aeronautics Administration did register the airplane.

A. That is right.

The Court: You want to know why they did register it?

Mr. George C. Finn: Your Honor, I want to know if he knows, or is it his opinion, or to his knowledge, was the result of the meeting that we had in his office discussing all these facts the reason that the Civil Aeronautics Administration decided to go against the policy.

The Witness: I would say that it was not the result of the meeting, Mr. Finn.

Q. (By Mr. George C. Finn): Do you have any opinion what it was a result of?

A. I do not.

(Testimony of Edward G. Bradley.)

Q. Now, Mr. Bradley, it is a long time ago, isn't it——

The Court: You are beyond your two-minute limit, now. [707] Let's proceed. We all know it is a long time ago.

Mr. George C. Finn: I would like to refresh——

The Court: He has been on the stand long enough. He could have thought it over a long time.

Mr. George C. Finn: Don't you recall——

The Court: You are doing like most lawyers do on cross-examination. You won't leave good enough alone.

Q. (By Mr. George C. Finn): Don't you recall, Mr. Bradley, that we had a final issue here as to the fact that Form 35 did not coincide with the Form 65, and that the Form 35 coincided with a rescinded regulation, and the Form 65 reactivated the rescinded regulation? You remember that as part of our discussion?

A. At which meeting was that, Mr. Finn?

Q. At our conference.

A. My recollection is that the Form 35 was not discussed at the meeting with the lawyers.

Q. Do you recall my coming to you, Mr. Bradley, and saying to you, "Why doesn't this coincide with the Regulation"?

A. Which one are you talking about?

Q. This Form 65 doesn't coincide with the Regulation.

(Testimony of Edward G. Bradley.)

A. I recall you stated there was a difference in the language.

Q. And weren't you and I at the special meeting? That [708] is, I came to your office alone, subsequent to the conference? A. Yes, you did.

Q. That is right. Do you remember which way your desk was facing, Mr. Bradley? Wasn't it facing the door of that office?

The Court: Let's don't go into that.

Mr. George C. Finn: This is important, your Honor.

The Court: It doesn't make any difference whether he had a desk or not.

Mr. George C. Finn: It does in this case, your Honor.

The Court: I will cut off your cross-examination if you don't abide by the rules of conduct.

Q. (By Mr. George C. Finn): Mr. Bradley, when we entered this discussion, I asked you, "Why doesn't this comply? This Form 65 just doesn't comply with the regulations." You recall that?

A. Yes.

Q. And you admitted that it didn't didn't you?

A. Yes, I said there was a difference in language.

Q. That is correct. Didn't you pull out of the middle drawer of your desk a tissue paper document and say, "Well, this may have some bearing on the matter"?

I asked you, "What's that?"

And you said, "Well, this is a jacket that went

(Testimony of Edward G. Bradley.)

to the printer in order to make up this [709] form."

Do you recall this conversation? This is a long time ago, now, I realize that.

The Court: You aren't permitted just to rub down the witness, so to speak, to try to get him to remember. You asked him whether he remembered or not.

Q. (By Mr. George C. Finn): Don't you remember this tissue paper, Mr. Bradley?

A. I do not recall.

Q. Now, I was in a hurry, and you sent it down to the photostater, and he photostated it, and I came back an hour later, and you recall that you said, "It is not a very good photostat. It shoots right through the paper." And it was a little garbled on the front because the thing was so thin.

The Court: You asked him about 40 questions in one. Which one do you want answered?

Q. (By Mr. George C. Finn): Do you recall this, Mr. Bradley?

A. I do not recall the incident.

Q. Do you recall ever making a photostat for me at all? A. Yes, sir.

Q. That was the photostat of the Form 65?

A. Yes, sir.

Q. Do you recall making the photostat of the Form 35, the jacket that was sent to the printer?

A. No, sir, I do not. [710]

Mr. George C. Finn: Thank you. Your Honor, I would like to have had time to go into this affidavit.

(Testimony of Edward G. Bradley.)

The Court: You will be given time when we get the original here. Counsel says it is a duplicate original that you have. Are you willing to accept that?

Mr. George C. Finn: No, your Honor, on the basis of the question that was asked me on the stand, stating I offered Mr. Bradley \$2,000 or \$3,000 for a bill of sale.

The Court: You heard his testimony this morning.

Mr. George C. Finn: That has nothing to do with the affidavit, your Honor, I believe. I have——

The Court: The witness says he has made one affidavit. Do you have any information he has made more than one?

Mr. George C. Finn: No, your Honor.

The Court: Very well. You have in your hand what the Government says is a duplicate original of that affidavit. Do you have any information to the contrary?

Mr. George C. Finn: My recollection is that——

The Court: I don't want to hear that. You aren't on the stand testifying. If you want to testify you will take the stand.

Mr. George C. Finn: My information to the contrary comes from this statement——

The Court: I don't want to hear it.

Mr. George C. Finn: That the [711] statement——

The Court: Do you contend there is another affidavit?

(Testimony of Edward G. Bradley.)

Mr. George C. Finn: I contend the statement made to me is not in this affidavit.

The Court: It may not be.

Mr. George C. Finn: It was purported to be in this affidavit, your Honor.

The Court: Any further questions of this witness?

Mr. George C. Finn: Plaintiff allegedly read from the affidavit. Now, I don't find that statement——

The Court: Did Mr. Abbott ask you the question?

Mr. George C. Finn: Yes, your Honor.

The Court: Take it up with him at the recess. You gentlemen can speak to each other.

Mr. Abbott: This affidavit——

The Court: I don't want to hear about it, now. Speak to each other at the recess about it.

Any further questions of this witness?

Mr. Abbott: The government has some questions.

The Court: There will be no recess until we finish with this witness.

Redirect Examination

By Mr. Abbott:

Q. Will you please state, Mr. Bradley, what duties you had as Chief of the Compliance Section, in addition to the [712] duties relative to the surplus property in the possession of the school districts? Be brief, sir.

(Testimony of Edward G. Bradley.)

A. I handled real property transactions, that is, compliance cases where schools or hospitals wished to remove some of the restrictions that were placed upon the disposal of real property, and also any requests from schools or hospitals with regard to the usage of personal property, and also any aircraft matters that came up.

Q. Can you estimate the total amount of your time consumed in handling aircrafts matters relating to educational disposal while you were Chief of the Compliance Section?

A. I would say that the real property transactions took better than 50 per cent of the time, and——

Q. Well—pardon me. Go ahead.

A. ——aircraft disposal and the other personal property disposal matters took the balance of the time.

Mr. Abbott: Will the clerk please place before the witness Plaintiff's Exhibits 5 and 12.

Q. (By Mr. Abbott): While the clerk is searching for those, can you state whether you made any notation, mental or otherwise, of the serial number on the bill of sale displayed to you by Mr. Finn, in the course of your meetings with him?

A. No, sir, I did not.

Q. Will you examine Plaintiff's Exhibits 5 and 12? [713] Exhibit 5 relates to the plane in suit and Exhibit 12 relates to the hulk. Will you please state whether, from that examination, you can state if either one of those was the bill of sale displayed, and if so, which?

(Testimony of Edward G. Bradley.)

A. I cannot state which bill of sale was shown to me by Mr. Finn. It was either one or the other. I do not know.

Q. Mr. George Finn has testified that the meeting with the several attorneys occurred on April 4, 1951. Do you have any reason to question the accuracy of that date, Mr. Bradley?

A. No, sir, I have not.

Q. Now, calling your attention to the dates of the two bills of sale, Plaintiff's Exhibits 5 and 12, can you tell, from an inspection of those two documents, which, if either of them, might have been the document shown to you in the course of your meetings with Mr. Finn?

The Court: "Might" have been? He says either one of them might have been. That doesn't advance you anywhere.

Q. (By Mr. Abbott): Or was furnished——

The Court: "Was." Can you tell now which it was, Mr. Bradley? Was it Exhibit 5 or was it Exhibit 12?

The Witness: Since the meeting was held on April 4, 1951, I would assume that any bill of sale shown to me would have to be dated prior to that time. It appears that Exhibit 12 has a date prior to the date of the meeting with Mr. Finn.

Q. (By Mr. Abbott): Can you state whether or not Exhibit [714] 5 could have been the bill of sale displayed to you, Mr. Bradley?

A. It could have been, sir.

(Testimony of Edward G. Bradley.)

Q. Have you examined the date on that document? A. Yes, sir.

Q. After an examination of that date, what is your testimony as to whether or not that could have been—and by “that” I mean Exhibit 5—the document displayed on April 4, or prior thereto?

I am referring to the date upon the photostatic document, not the certification, sir.

A. Which date?

The Court: The date is February 28th, isn't it?

Mr. Abbott: April 14th.

The Court: The bill of sale is dated February 28th.

Mr. Abbott: Effective February 28th, but signed and subscribed on April 14th.

The Court: It speaks for itself, doesn't it?

Mr. Abbott: On its face.

Q. (By Mr. Abbott): How many files relating to educational disposal were there in your office at the time of your meeting with Mr. Finn?

A. I would estimate approximately six or seven hundred files.

Q. In your normal transactions with persons who [715] requested release of restrictions relative to aircraft in the hands of school districts, was it necessary to refer to the files? A. No, sir.

Q. Was that ever done, except in the transaction with Mr. Finn?

A. Not while I was there, sir.

The Court: Will the clerk please place before

(Testimony of Edward G. Bradley.)

the witness Plaintiff's Exhibit 14 for identification, a document previously displayed to counsel?

Q. (By Mr. Abbott): Does that document represent a monument of the policy or part of the policy to which you have testified, sir?

A. It does, sir.

Mr. Abbott: May Plaintiff's Exhibit 14 be admitted in evidence, your Honor?

The Court: Any objection?

Mr. Blackman: I don't know what the description of that would be. May I have it identified before it is offered in evidence?

Mr. Abbott: Plaintiff's Exhibit No. 14 is the letter from Mr. Wisner of the Department of Defense to Mr. Larsen, General Services Administrator, dated February 28, 1948.

The Court: It doesn't appear to be on this list of exhibits, as I have it. [716]

Mr. Abbott: It has been marked this morning.

The Court: Very well. Is there objection to the offer? Received in evidence.

(The document referred to, marked Plaintiff's Exhibit 14, was received in evidence.)

Mr. Abbott: Will the clerk please place before the witness Plaintiff's Exhibit 15 for identification?

Mr. Nelson: If the court please, we have no objection to the offer in evidence, but there was a question as to whether this is the policy. I am a little confused as to which policy we are referring to, inasmuch as we have had so many of them.

(Testimony of Edward G. Bradley.)

Mr. Abbott: The document will speak for itself.

The Court: Haven't you seen the document?

Mr. Nelson: Perhaps I did earlier this morning. But if I have just a statement as to which one it is, that will be satisfactory.

Mr. Abbott: Plaintiff's Exhibit 14 is a letter from Mr. Wisner of the Department of Defense to Mr. Larsen, General Services Administrator, dated February 18, 1948.

Q. (By Mr. Abbott): Have you examined Plaintiff's Exhibit 15 for identification, Mr. Bradley?

A. Yes, sir.

Q. Have you seen that document before, sir?

A. I have, sir. [717]

Q. When? A. In January of 1951.

Q. Does that document constitute a monument of the policy of the Federal Security Administration relating to the screening of aircraft for military use as that policy existed in April, 1951?

A. It does.

Mr. Abbott: We offer in evidence Plaintiff's Exhibit 15, your Honor.

The Court: Is there any objection?

Received in evidence.

(The document referred to, marked Plaintiff's Exhibit 15, was received in evidence.)

Q. (By Mr. Abbott): From your examination of the pictures of an airplane displayed to you by Mr. George Finn, did you form any opinion as to

(Testimony of Edward G. Bradley.)

whether or not that airplane could be readily placed in a flyable condition?

Mr. Blackman: Just a moment. If the court please, I don't know what "readily placed in a flyable condition" means. It is vague and indefinite. It calls for a conclusion of a witness not qualified to express an opinion.

The Court: Sustained.

Q. (By Mr. Abbott): From the examination of the pictures displayed by Mr. Finn to you, did you form an opinion as to whether the aircraft so portrayed would be one which could [718] be readily used by a military establishment pursuant to the policy you described?

Mr. Blackman: Same objection.

The Court: Sustained.

Q. (By Mr. Abbott): Do you have, as a part of your official duties, as those duties existed in April, 1951, any power to control the action of the Civil Aeronautics Administration?

A. None whatsoever.

Q. Did, at that time, any of your superiors have any power to control the action of the Civil Aeronautics Administration?

A. Not that I am aware of.

Q. And by "superiors," I mean those within the Federal Security Agency. Did you so understand the question? A. Yes, sir.

Q. Did you witness any conversation between the laywers representing the Federal Security Administration and Mr. Howard relative to Mr.

(Testimony of Edward G. Bradley.)

Howard's declaration as to registerable interest in the aircraft described by Mr. Finn?

A. I did hear that statement.

Q. What in particular did Mr. Hiller and Mr. Davidson, the Federal Security Administration lawyers, say on that subject to Mr. Howard?

A. As I recall it from Mr. Hiller and Mr. [719] Davidson, did not agree there was a registerable interest.

The Court: Your next question?

Q. (By Mr. Abbott): Was anything else said on that point, sir?

The Court: Haven't we been over it once? I think it has probably been two or three times.

Mr. Abbott: We have, your Honor.

Q. (By Mr. Abbott): If a notice from the General Services Administrator, pursuant to your organic law, had been given relative to any aircraft in the possession of Vineland Elementary School District, would you be aware of that notice, if given during the period when you occupied the position of Chief of the Compliance Section?

A. Yes, I would have known.

Mr. Abbott: Your Honor, there has been some reference to a sale of an aircraft at San Luis Obispo. The court had instructed the Government to secure the facts relative to that transaction and propose a stipulation. We are prepared to do so at this time.

The Court: Have you discussed it with counsel outside of court?

(Testimony of Edward G. Bradley.)

Mr. Abbott: I have not, your Honor.

The Court: Don't bring any of these matters here until you gentlemen discuss them outside of court. We had that agreement at the pretrial proceedings, as I understood. [720] Anything further? What about this affidavit that was discussed. Is the original here?

Mr. Abbott: I have the original, your Honor.

The Court: Do you wish to see it, Mr. George Finn?

Any further questions of Mr. Bradley?

Mr. Blackman: I have just a very few, your Honor.

The Court: Very well. We will have no recess until we finish with this witness. If they are worth delaying the recess for, you may proceed.

Recross-Examination

By Mr. Blackman:

Q. You were asked by Mr. Abbott, whether or not you had any power to control the action of the Civil Aeronautics Administration, and you said you did have none; is that right?

A. That is right, sir.

Q. But you did have it within your power to send over to the Civil Aeronautics Administration a copy of the War Assets Form 65, Plaintiff's Exhibit 1 for identification, did you not?

(Testimony of Edward G. Bradley.)

Mr. Abbott: That question assumes an erroneous state of the record. There has been no such testimony.

Mr. Blackman: What testimony?

Mr. Abbott: Furthermore, the question, your Honor, is improper in form, and is [721] immaterial.

The Court: It is improper in form. Sustained. Do you wish to ask him if there was any reason why he didn't?

Q. (By Mr. Blackman): Was there any reason why you couldn't send over to the——

The Court: Why he didn't.

Q. (By Mr. Blackman): ——why you didn't send over to the Civil Aeronautics Administration a copy of War Assets Form 65, which is Plaintiff's Exhibit 1 in this case, so they could record it in the file pertaining to this airplane?

The Witness: Would you state that again, please?

The Court: Is there any reason why you didn't send over to the Civil Aeronautics Administration Plaintiff's Exhibit 1, Form 65, or any other document which would show these Government limitations upon the use or resale of this airplane, so that anyone examining the records in the Civil Aeronautics Administration would see these things and know about them?

Is that your question?

Mr. Blackman: That is the question exactly, your Honor.

(Testimony of Edward G. Bradley.)

The Witness: I do not recall we had any authority. If a person wanted to register a plane, that we had any—it was not a matter for our jurisdiction. I would have no reason to have sent a Form 65 to the Civil Aeronautics Administration. [722]

The Court: Except to advise them of the status of a plane. They keep a file on various planes, do they not?

The Witness: I presume so.

The Court: Wouldn't it be convenient for them to have all this information?

The Witness: I presume it would. But we never came to that agreement.

The Court: There was no reason that you know of why it wasn't done?

The Witness: No, sir.

The Court: Does that cover it, Mr. Blackman?

Mr. Blackman: Almost, your Honor.

Q. (By Mr. Blackman): As a matter of fact, Mr. Bradley, that was done in connection with the other C-46 which is not in suit, was it not?

Mr. Blackman: Mr. Clerk, will you lay before the witness Exhibit U?

Can you answer the question?

The Witness: Would you please repeat it?

Mr. Blackman: Mr. Reporter, will you please read it?

(The question was read.)

The Witness: I have no knowledge that it was done in connection with this, that the Federal Secu-

(Testimony of Edward G. Bradley.)

rity Agency sent these documents over to the Civil Aeronautics Administration. Is that your question? [723]

Mr. Blackman: Are you looking at Exhibit U at this time?

The Court: Exhibit U is a certified copy of the Civil Aeronautics Administration file, is it?

Mr. Blackman: Yes, sir.

The Court: And your question is, does he know how those papers got into that file.

Mr. Blackman: That is as good a way of putting it, your Honor, as any.

The Witness: I do not know.

The Court: Do you see a copy of the War Assets Form 65 in there?

The Witness: Yes, sir.

Mr. Blackman: I have no further questions.

The Court: Anything further, Mr. Abbott?

Mr. Abbott: May it be stipulated, your Honor, that Exhibit U relates to the hulk, the aircraft portrayed in the pictures displayed by Mr. Finn?

Mr. Blackman: By all means.

The Court: Is it in evidence?

Mr. Blackman: If it isn't, we will offer it in evidence at this time.

The Court: That is up to you gentlemen to check and keep a list of what is in evidence.

Mr. Abbott: It is not in evidence. [724]

The Court: Is there objection to the offer?

Mr. Abbott: No objection.

Mr. Blackman: We are offering it.

(Testimony of Edward G. Bradley.)

Mr. Nelson: No objection.

The Court: Received in evidence as Exhibit U. Whose Exhibit U is it? International's?

Mr. Blackman: I don't believe it is International's.

Mr. Abbott: It is International's.

The Court: It may be received in evidence.

(The document referred to, marked International's Exhibit U, was received in evidence.)

The Court: Now, Mr. George Finn, do you have anything more you have to ask Mr. Bradley about this affidavit, or anything else?

Mr. Georeg C. Finn: Yes, your Honor.

The Court: Proceed.

Mr. George C. Finn: The question, your Honor, that I raised in this affidavit——

The Court: Just put your question.

Is there a copy of the document before the witness?

Mr. George C. Finn: Yes, your Honor. Oh, no, your Honor.

The Court: The Government says that one is a duplicate original.

Mr. Clerk, will you place the duplicate original before [725] the witness.

Mr. George C. Finn: Here, I will give him this one.

The Court: Has it been marked?

Mr. George C. Finn: Your Honor, you can mark it as our exhibit.

(Testimony of Edward G. Bradley.)

The Court: Mark it as Government's next exhibit in order for identification.

The Clerk: Government's No.16 for identification.

(The document referred to was marked Plaintiff's Exhibit 16 for identification.)

The Court: Your question? [726]

Q. (By Mr. George C. Finn): Mr. Bradley, referring to the statement that Mr. Finn offered to—on page 2, about the middle of the page it states, "He," and that is referring to Mr. Finn, "He indicated he would be willing to pay the Federal Government two or three thousand dollars to secure the execution of such a document," and it refers to a sales document. A. Yes, sir.

The Court: Now, what is your question?

Q. (By Mr. George C. Finn): Mr. Bradley, was that statement made as to you, or as to the Federal Government?

A. The statement was made, Mr. Finn, as to the Federal Government.

Q. Was it made to you for the Federal Government? A. Yes, sir.

Q. Who was present, Mr. Bradley?

A. Just you and I.

Q. Mr. Bradley, are you aware that the Government offered to settle this case for \$2,500, and return the airplane to the Finns?

Mr. Abbott: Objection, your Honor, and we cite it as misconduct.

(Testimony of Edward G. Bradley.)

The Court: Yes, it is contemptuous misconduct. You should be punished for it. The jury is instructed to disregard it. Any matter concerning compromise is not properly admissible. If you knew anything at all about practicing [727] law, you would know that.

Mr. George C. Finn: I am sorry, your Honor. I apologize. I didn't know about it.

The Court: That is the trouble with a layman practicing law.

Mr. Abbott: May the Government be heard with a motion as soon as we recess, your Honor?

The Court: Yes.

Mr. Charles C. Finn: Your Honor, I believe that he made the point——

The Court: You sit down. Any further questions of this witness?

Q. (By Mr. George C. Finn): On page 3, Mr. Bradley, you make the statement in this affidavit that reads, "In other words he"—and it refers to Mr. Finn—"was advised that the only title to the plane which he could receive from the school which would be recognized by the Federal Security Agency was a purchase under proper conditions of the plane as scrap."

The Court: What is your question? Did he say that or not, is that the question?

Mr. George C. Finn: No, your Honor.

The Court: What is your next question?

Q. (By Mr. George C. Finn): Mr. Bradley,

(Testimony of Edward G. Bradley.)

did you interpret that to mean the passage of title to the plane as scrap [728] was acceptable to the Federal Security Agency?

A. Would you please repeat that?

Q. Did you mean by that statement that the passage of title to the plane as scrap was acceptable to the Federal Security Agency?

The Court: Objection sustained. Put your next question.

Mr. George C. Finn: That was the last question, your Honor.

The Court: Very well, Any further questions of this witness?

Mr. Abbott: None by the Government, your Honor.

Mr. Nelson: No cross-examination.

The Court: You may step down. You are excused.

(Witness excused.)

The Court: We will take the usual afternoon recess, ladies and gentlemen, for five minutes, subject to the usual admonition.

(Thereupon the jury retired from the courtroom.)

The Court: Let the record show the jury has retired from the courtroom. The clerk has forms of special verdict to hand to counsel and the parties, and I will ask you, gentlemen, to examine them.

Mr. Abbott: May the Government be heard with a motion at this time, your Honor?

The Court: You may. [729]

Mr. Abbott: The remarks of Mr. Finn at the close of the session just concluded, standing alone would more than justify an order of mistrial, your Honor. We so move, but in addition to those remarks so made, we will ask the court to briefly review the record of conduct by these defendants in this case time after time despite the court's admonition. They have stood up, and in the presence of the jury, have stated that the Government has deprived them of a jury trial in this case, which not only has the effect and does prejudice the Government's case, but was well calculated to do so, and though some rules of judicial conduct and of professional conduct are probably known only to lawyers, or best to lawyers, there can be no doubt as to both Messrs. Finn in making those statements on repeated occasions during the course of this trial. This last statement by Mr. George Finn that there has been an offer to compromise the suit by some figure of some \$2,500 is not only misleading, but even if it were completely true, it would be highly prejudicial to the Government's case.

We, therefore, move the court in this case to dismiss the jury and hear the case without a jury.

Mr. Blackman: We have nothing to say, your Honor.

Mr. Nelson: Nothing to say at this time, your Honor.

Mr. George C. Finn: Your Honor, any reference that was made in our case in the record was not

made with any intent [730] or with any knowledge of dropping any proceedings.

The Court: In other words, you want to tell the court that you, a man of your maturity, thought it was perfectly proper to bring before the jury an offer of compromise?

Mr. George C. Finn: I didn't know, your Honor.

The Court: Did you ever hear of such a thing?

Mr. George C. Finn: No, sir.

The Court: In other words, in every accident case you would think that the plaintiff could come in and say, "Well, this morning the defendant offered me \$4,000?" Did you have that idea?

Mr. George C. Finn: No, your Honor.

The Court: Very well. Then why did you bring it before the jury?

Mr. George C. Finn: I can explain it, your Honor. As I understood the situation that occurred in court, that Mr. Abbott made the reference to me on the witness stand that I had offered Mr. Bradley, \$2,000 for a sales document.

I believe the record will show that I did not make any offer to the Government, but the question was put in such a fashion that I had offered to Mr. Bradley \$2,000 for a sales document, and then when I read Mr. Bradley's affidavit——

The Court: I heard the evidence. I didn't get the inference that the Government was attempting to insinuate in the slightest that there was an attempt made to bribe Mr. [731] Bradley. I understood it to be an offer to the Government.

Mr. George C. Finn: Your Honor, I was on the

witness stand, and it wasn't presented to me as an offer to the Government. It was presented——

The Court: In this trial, when you were on the witness stand?

Mr. George C. Finn: Yes.

The Court: And you say there the insinuation was made?

Mr. George C. Finn: Mr. Abbott asked me a question: "Did you ever offer" I believe it was "to Mr. Bradley of Federal Security Agency \$2,000 for a bill of sale to this airplane?"

And I would like to have the record read back, so that I can refresh my recollection.

The Court: Assume he did. What about it?

Mr. George C. Finn: Your Honor, the statement was made——

The Court: There was no insinuation, as I recall that it was a personal offer, or that it was an attempt to bribe, if that is what you are referring to.

Mr. George C. Finn: Your Honor, that is the insinuation I determined from this, and because of prior knowledge I had of Mr. Bradley, that the Government had an affidavit which stated that I had offered Mr. Bradley \$2,000.

The Court: What does that have to do with bringing before a jury an alleged offer of compromise in the lawsuit? [732]

Mr. George C. Finn: That has to do that I couldn't offer Mr. Bradley \$2,000 for a bill of sale for the plane.

The Court: Mr. Bradley said this morning that

you offered him or to the Government, that is, something, and he said again this afternoon that you made your offer, and there was no insinuation, that I heard, that it was anything but an offer to the Government.

Now, what does that have to do with bringing in an offer of compromise before the jury?

Mr. George C. Finn: Not this afternoon, your Honor, but prior to this, in the trial the insinuation was made that I had offered Mr. Bradley, \$2,000. The truth is that I did not offer Mr. Bradley or the Government that and the fact was that I refused to accept the Government's offer of \$2,500 to clean up this whole lawsuit.

The Court: And that is your idea of proof, is it?

Mr. George C. Finn: That is my idea.

The Court: In other words, it is your idea, and you are telling the court in good faith that if this was a personal injury action, an automobile accident case, that that kind of evidence could be brought before the jury, that you could say, "You know the insurance company offered me so much," and you could do that before the court?

Mr. George C. Finn: No, your Honor, that I wasn't bringing out in front of the jury. I was bringing out before [733] the jury the fact. I would not possibly—I would not under any circumstances——

The Court: That is a matter of argument.

Mr. George C. Finn: Yes, your Honor. I wouldn't know that. I was establishing the founda-

tion that it would be foolish to offer Mr. Bradley \$2,000 for a sales document on a scrapped airplane, where I wouldn't even accept or give them any money on an airplane that was in suit, which they asked \$198,000 for. That is my position, and that was the only position I take.

The Court: I didn't ask you your position. I asked you why you brought it out in the presence of the jury, when anyone would know that that is improper, it seems to me.

Mr. George C. Finn: That was why I brought it out, your Honor.

The Court: Because you knew it was improper?

Mr. George C. Finn: No, your Honor, it didn't seem to me to be improper. It seemed to me to be expressing the truth of the matter, and I related it for that. The relationship is what I was interested in, the facts as they are set forth in order, in chronological order, and I wanted to establish that such a position was erroneous.

The Court: I will deny the motion for a mistrial. I will entertain a motion that this party be held in contempt of court and be punished accordingly in due time. [734]

Mr. Abbott: The Government so moves, your Honor.

The Court: It will take more than that. I will entertain a formal motion.

Mr. Abbott: Shall the Government proceed by written moving papers, or will the court entertain an oral motion at this time?

The Court: I think you should proceed by written papers, so that the matter will be entered in due form, and be specific.

Mr. Charles C. Finn: May I ask a question, your Honor?

The Court: Yes.

Mr. Charles C. Finn: Do we understand, your Honor, we are now—my brother is now held in contempt of court?

The Court: No. I said I will entertain a motion by the Government to hold him in contempt of court for what he has just done.

Mr. Charles C. Finn: Do we have any defense against that motion?

The Court: You will be heard; that is, your brother will be. You are not involved in it.

Mr. Charles C. Finn: Will I—

The Court: Do you want to get involved in it? Is that what you want, too?

Mr. Charles C. Finn: I am involved in this respect—

The Court: Not in this incident, and I suggest you sit [735] down and stay out of it.

Now, we will take it up in due course, at the end of the trial.

Mr. Abbott: Anything further, if the court please?

Mr. Nelson: Now, if the court please, on these interrogatories—

The Court: I don't want to discuss these interrogatories until we discuss them all at once.

Mr. Nelson: Then I will hold it until that time.

The Court: You discuss them with counsel first, unless there is some obvious matter.

Mr. Nelson: No, your Honor, it isn't. It is a substantive matter.

The Court: Very well. We will recess for five minutes.

(Short recess.)

The Court: The record will show the jury are present. You may call the Government's next witness on rebuttal.

Mr. Abbott: Mr. Hiller, please.

MANUEL B. HILLER

called as a witness by and on behalf of the plaintiff, in rebuttal, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Manuel B. Hiller, H-i-l-l-e-r.

The Clerk: Be seated, Mr. Hiller, please. [736]

Direct Examination

By Mr. Abbott:

Q. What is your profession, sir?

A. I am a lawyer.

Q. And what is your present employment?

A. I am employed by the Department of Health, Education and Welfare.

Q. How long have you been employed by the Government in a legal capacity, sir?

A. Since 1942.

Q. Calling your attention to the month of April, 1951, did you attend a meeting with Mr. George

(Testimony of Manuel B. Hiller.)

Finn, Mr. E. O. Bradley, Mr. E. J. Davidson, all of the Federal Security Agency, except Mr. Finn, and a Mr. Howard of the Civil Aeronautics Administration and a Miss O'Neil of the Civil Aeronautics Administration? A. I did.

Q. Do you recall the date of that meeting?

A. Not the exact date. It was sometime in the month of April.

Q. Do you recall whether it was in the early or the latter part of April, Mr. Hiller?

A. I would say it was probably in the earlier half of the month.

Q. Do you recall the place of that meeting? [737]

A. Yes, sir.

Q. Where was it?

A. It was in the office of Mr. Bradley.

Q. Was that in the Federal Security Agency building in Washington, D. C.?

A. That is correct, sir.

Q. Will you please state to the court and jury, sir, what was said by each of the persons present, as nearly as possible to the order in which it was in fact said?

A. Well, sir, the meeting was opened by Mr. Bradley, as I recall, with a statement of the facts involved, the alleged purchase of an aircraft by Mr. Finn, from the Vineland School District, and Mr. Finn's interest in ascertaining the limitations or restrictions to which the plane was subject, and what, if any, relief could be afforded to Mr. Finn insofar as having the limitations or the restrictions removed.

(Testimony of Manuel B. Hiller.)

We had rather extended discussion concerning the limitations, as they were contained in the War Assets Form 65 agreement.

Mr. Blackman: If the court please, is this what the witness said in this meeting, or is he saying——

The Court: He is summarizing what happened in the meeting, as I understand his answer. Is that correct?

The Witness: That is correct, sir.

Mr. Blackman: Very well. [738]

The Witness: Our discussion centered mainly upon the language contained in the Form 65 agreement, and the language contained in War Assets Regulation No. 4, the difference that existed between the language, and the legal effect and consequences flowing from that difference or distinction.

After some time, or, rather, Mr. Finn urged that the language in the Form 65 agreement should be read consistent with the language in the regulation.

I pointed out to Mr. Finn that the language went beyond the limitations or the requirements of the regulation, and that they established the terms of the transfer by which the plane was made available to the school for educational purposes.

The Court: As a matter of fact, the language of the Form 65 was the language of the regulation, as it had previously existed before being amended, wasn't it, in substance?

The Witness: I believe so.

(Testimony of Manuel B. Hiller.)

The Court: In other words, at the time you talked there had been a time when Regulation 4, laid down the same requirements as are in that document, Form 65?

The Witness: Well, there was a slight difference, if you please, your Honor.

The Court: In substance?

The Witness: The Form 35, which was an RFC form that preceded the Form 65, was one which was entirely consistent with the prior regulation, the Surplus Property Board Regulation 4. [739] The War Assets Form 65 was not identical in language with the language contained in the War Assets Regulation 4.

The Court: Both of them contained restrictions greater than those at the time of your meeting provided in Regulation 4?

The Witness: Only the Form 65, your Honor.

The Court. Only the Form 65?

The Witness: That's right.

Q. (By Mr. Abbott): Go ahead with your relation of what occurred, please.

A. Well, as I said, Mr. Finn was arguing the interpretation to be placed upon the language in the Form 65 agreement. During the course of the conversation Mr. Howard expressed an opinion respecting the Form 65 agreement. He said that so far as he was concerned he thought that there might have been transferred, by virtue of the Form 65 agreement, an interest or such title as he would feel himself compelled under the Civil Aeronautics

(Testimony of Manuel B. Hiller.)

Act to respect by registration under that Act, and under the regulations issued by the Civil Aeronautics Administration.

However, he did indicate, or say, in fact, that registration under that Act is not evidence of ownership; that if there were any dispute respecting the ownership of any aircraft involved by reason of a Form 65 agreement, that that dispute was one to be settled between the claimed owner and [740] the United States by appropriate proceedings in a court having jurisdiction.

As a result of this provision, Mr. Finn asked, in effect, "Well, what did I get for my money?"

To which point I said, "That, at most, Mr. Finn, I believe that you got the right, if any, to scrap the plane, reduce it to scrap, and sell it for whatever scrap value it may have."

He then addressed himself to the question of what relief, if any, we could afford him from the limitations of the Form 65 agreement.

I indicated to him that we were powerless to grant any relief, because the Administrator of the Agency had issued a policy statement regarding all educational aircraft. The substance of the policy was to the effect that no aircraft will be released from the educational restrictions for sale for flight purposes, that they could only be redisposed of for scrap purposes, in accordance with the terms of the original instruments.

Mr. Finn wanted to know whether or not that regulation was one which was binding upon us. I

(Testimony of Manuel B. Hiller.)

said that it was. I indicated that no departure from the regulation had been made, to my knowledge, and that if he was unhappy with it, why, he was at perfect liberty to attempt to see the Federal Security Agency Administrator, and request of him either that the [741] policy be reviewed, or that an exception to the policy be made in his case, and it was more or less upon that note that we terminated the conference.

Q. Have you had any other conferences with Mr. Finn at any time? A. No, sir.

Q. Would your duties require you to have knowledge as to whether or not any person authorized by statute took steps to release or modify restrictions, or to release or modify the Government's interest in any aircraft—— A. Yes, sir.

Q. ——in the possession of Vineland?

A. Yes, sir.

Q. Can you state whether or not that has occurred? A. That has not.

Q. Do your duties require you to know whether or not any person authorized by law has sent a notice to the Administrator or the General Services Administration of a proposed release or modification of restrictions upon sale, use or possession of any aircraft in the possession of the Vineland Elementary School District?

A. I would be informed or made aware of any such notice.

Q. Was there in fact such a notice with respect

(Testimony of Manuel B. Hiller.)

to any of the aircraft in the possession of the Vineland Elementary School District? [742]

A. No, sir.

Q. Now, are you confining your answer to any particular time, or does your answer cover the entire period when Vineland was in the possession of the aircraft?

A. Well, sir, I have many times reviewed the files involving the Vineland School District, and if any notice were ever given to that effect, a copy of that notice would have been in the files, and as of last week, which was the last time I had occasion to review the files, I found no such notice.

Q. Have you had occasion to search the files of the Federal Security Agency to ascertain whether or not those files contained any letter fixing a policy for registration or non-registration of aircraft in the hands of schools? A. Yes, sir.

Q. Did you find any such letter?

A. I believe I found one such letter.

Mr. Abbott: May Plaintiff's Exhibit 11 be placed before the witness.

The Clerk: It does not seem to be here, Mr. Abbott, with the rest of them.

The Court: Was it before Mr. Bradley near the end of his examination?

The Clerk: Yes, here it is, your Honor. That is it (indicating to witness). [743]

The Court: What is your question?

Q. (By Mr. Abbott): Is that the letter that you found, referring now to Plaintiff's Exhibit 11?

(Testimony of Manuel B. Hiller.)

A. Yes, I believe it is. [744]

Q. Are you able to state whether or not there is any other letter in the files of the Federal Security Agency relative to arrangements for registration or non-registration by the Civil Aeronautics Administration of aircraft in the possession of schools pursuant to the Surplus Property Act of 1944?

A. I found no letter other than the one before me.

Q. Did you cause a search to be made of the records of the Civil Aeronautics Administration to determine those files contained any such letters?

A. I did, sir.

Q. And what was the result of that search?

A. No letter other than this one was found in the Civil Aeronautics Administration files.

Q. Do you know what persons—when you say “this one,” sir, are you referring to Plaintiff’s Exhibit 11?

A. That is correct, sir.

Q. What persons within the Federal Security Agency have been given authority to release or modify restrictions or interests which the Government possessed with respect to aircraft in the possession of schools pursuant to the Surplus Property Act of 1944?

A. Only those persons to whom delegations were formally issued, and they were the Director of the Office of Field Services and the Chief of Surplus Property Utilization [745] Division.

Q. Are you aware of any action by either of those offices by which they modified, released or

(Testimony of Manuel B. Hiller.)

affected in any fashion restrictions existing, and the interest of the Government, existing in and to property in the possession of the Vineland Elementary School District, and received by it pursuant to the Surplus Property Act of 1944?

A. No, sir.

Mr. Blackman: Just a moment. That is objected to as no proper foundation laid, and calling for a conclusion of this witness in its present form.

The Court: Sustained. I suggest you rephrase it. The answer will be stricken.

Q. (By Mr. Abbott): Do the duties of your office require that you be aware of action taken by any of the persons authorized to exercise the functions of the Federal Security Administrator pursuant to 40 U.S.C Section 484(K)(2)(a)?

A. Yes, sir.

Q. Are you aware of any action taken by any of the persons authorized to perform that function with respect to the property in the hands of the Vineland Elementary School pursuant to Surplus Property Act of 1944?

Mr. Blackman: That same objection, your Honor; and further, on the grounds that an affirmative action as distinguished from a negative action would be required. [746]

Mr. Abbott: There can be no doubt that affirmative action is required under the statutes, your Honor.

The Court: Please read the question, Mr. Reporter.

(Testimony of Manuel B. Hiller.)

(The question was read.)

The Court: Persons authorized to perform what functions?

Mr. Abbott: The functions defined in 40 U.S.C. 484(K)(2)(a), your Honor.

The Court: Relating to restrictions upon use or resale?

Mr. Abbott: Or in any way affecting the Government's interest——

The Court: The question is, does he know who would be authorized?

Mr. Abbott: Does he know whether any of the persons authorized, whom he has previously described, have taken any action to release or modify those restrictions, or that interest?

The Court: Do you understand the question?

The Witness: Yes.

The Court: Overruled. You may answer.

The Witness: I know that no such action was taken by those so authorized.

Q. (By Mr. Abbott): Calling your attention to the meeting with Mr. Finn and the others, which you previously described, was there, in the course of that meeting, any statement by any representative of the Federal Security Agency [747] to the effect, or in substance, that those representatives were not able to determine why the provisions of War Assets Administration Form 65 did not coincide with Regulation 4, as Mr. Finn has testified?

(Testimony of Manuel B. Hiller.)

A. No, I don't believe I recall such a conversation.

Q. Was there any statement by any representative of the Federal Security Agency in the course of that conference, in substance or effect; that if the Civil Aeronautics Administration wished to accept the Finns' proof of title and give to the Finns their registration, that such action would be acceptable to the Federal Security Agency?

A. No, sir. The conversation was to the effect that registration, if any, would have no effect upon ownership and would have no bearing upon our own dispute or acceptability or unacceptability.

Q. Was Mr. Howard viewing a Form 65 specimen at the time of that conversation, or in the course of it? A. I believe so.

Q. Was there any particular file being examined or displayed in the course of that conversation?

A. My recollection is that we had one or more copies of the War Assets Regulation 4, and several blank incomplete copies of the War Assets Form 65 agreement.

Q. In the course of that conference was there any examination of any particular file relating to any particular [748] transactions?

A. No, sir. The conversation was a general one. It related in great part to the interpretation and the legal effect of the form as a form, and the provisions in Regulation 4.

Q. Was there, in the course of that conference, any discussion of a policy letter written by the

(Testimony of Manuel B. Hiller.)

Federal Security Agency to the Civil Aeronautics Administration relative to restriction of school aircraft, as Mr. Finn has stated?

A. I don't recall any.

Q. Had you at the time of that conference ever heard of any such policy letter? Do you understand my question, sir?

A. Would you repeat it, please?

Q. Had you, at the time of the conference in April, 1951, which you have described, heard or received any knowledge of any policy letter written by the Federal Security Agency to the Civil Aeronautics Administration and relating to the restriction of school aircraft?

A. No, I don't recall.

Q. In the course of the meeting which you have described in your testimony was there any reference to a document entitled "sales receipt"?

Mr. Abbott: And in that regard I will ask that the clerk place before you International's Exhibit A.

Q. (By Mr. Abbott): Viewing now International's Exhibit [749] A, and that page of it which is entitled "Sales Receipt," Mr. Hiller, was there any discussion in the course of the conference described of a document entitled "Sales Receipt," or any specimen of that document?

A. No, sir. I don't believe we had any such document at the time.

Q. Was there any discussion, in substance or effect, in this tenor, that the sales receipt document

(Testimony of Manuel B. Hiller.)

or a sales receipt document contained all of the elements of a bill of sale?

A. I don't recall it.

Q. Was there any discussion relative to what the elements of a bill of sale might be in the course of that discussion?

A. Well, we did have a bit of a discussion as to the effect of the Form 65 agreement, and whether or not that would constitute a bill of sale or would serve to pass title or any other interest in the property. But I don't recall that that conversation was related to this document.

Q. Was there any other conversation then, that is, conversation not related to the Form 65, in which you and the other persons present discussed the elements of a bill of sale? A. No.

Q. What was your response when Mr. Howard stated that the Form 65 appeared to him to create a registerable interest? [750]

A. Well, I told him that I was constrained to take issue with him. Mr. Davidson joined me in that view. We felt, and we so expressed ourselves, that the Form 65 agreement was a general agreement that had no relation to any specific property at the time, and so it could not serve to effectively pass title to any specific piece of property.

We pointed that out to Mr. Howard, and there was the difference of opinion between our two respective agencies. However that may have been, Mr. Howard, as I said before, indicated that while it might constitute, as far as he was concerned, a

(Testimony of Manuel B. Hiller.)

document upon which he might feel his agency might be constrained to grant registration, it would not be declaratory of the rights of ownership by respecting the claim. That those were rights—those rights, or the ownership of the plane was something that was a matter for the courts.

Mr. Abbott: No further questions, your Honor.

The Court: Any cross-examination?

Cross-Examination

By Mr. Blackman:

Q. Mr. Miller, how long have you been with the Department of Health, Education and Welfare?

A. I became associated with the Department of Health, Education and Welfare in January of 1950. I left it [751] approximately June of 1951, and returned about June of 1953.

Q. So that in telling us what you knew or didn't know about what any of these officials did, you would limit your statement to the period of time that you were connected with that department, is that right?

A. Well, insofar as my knowledge of certain facts, to which I have testified, is based upon my review of files. Those files extend beyond the entire period, even though I may have been away for some small time in between.

The Court: If action did not appear in the file, you would not know about it?

The Witness: That is correct.

(Testimony of Manuel B. Hiller.)

Q. (By Mr. Blackman): When you refer to files, are you referring to the file involving the disposal of aircraft property to the Vineland School District, which is maintained by the Federal Security Agency? A. That is correct, sir.

Q. You stated you have looked at that file many times, I believe, is that correct?

A. Well, sir, we have several files. We have a file in the office of the general counsel which contains legal views, documents of various kinds, and there is what we call an administrative file which is kept by the Surplus Property Utilization Division.

Now, up until the time that I left the Federal Security [752] Agency in 1951, I had, of course, seen both files. Since returning I have only had available to me the general counsel's file.

Q. That is the file which is most concerned with compliance? A. Not necessarily.

Q. Well, will you tell me the distinction between the two files, please?

A. Well, the surplus property file consists, normally, of the basic original documents in connection with any transfer or disposal; all the subsequent correspondence that follows in connection with the disposal or in connection with any compliance matter related thereto.

The general counsel's office maintains its own files respecting those cases which they have reason to open, whether it be a matter of compliance or not.

(Testimony of Manuel B. Hiller.)

Now, we did have in this case a general counsel's file covering the Vineland aircraft.

Q. And before you left the agency in 1951 you had access to both files?

A. That is correct, sir.

Q. Since you returned to the agency you have only seen the general counsel's file, is that correct?

A. That is correct.

Q. Now, then, up until June of 1951, you had been [753] working with those files, is that correct?

A. That is right.

Q. And had looked at those files several times?

A. Yes, sir.

Q. How many aircraft did Vineland School District obtain from the Government, if you know?

A. Well, I have since learned—though I did not know at the time of the meeting with Mr. Finn—but I have since learned there were three involved. There were two C-46s and one AT-6.

Q. And the AT-6 is what is referred to as a tactical type aircraft?

A. I am not familiar with the designations beyond knowing that the C-46 and the C-47 were more or less transports.

The Court: And the AT-6 would be a trainer, would it not?

The Witness: I believe that was.

Mr. Blackman: I believe that is correct.

The Court: May it be so stipulated?

Mr. Abbott: So stipulated.

Mr. Nelson: So stipulated.

(Testimony of Manuel B. Hiller.)

Mr. Blackman: So stipulated.

Q. (By Mr. Blackman): Well, Mr. Hiller, is it your testimony that in your perusal of these files before June, [754] 1951, you were not aware that Vineland had obtained these three aircraft from the Government?

A. Perhaps I didn't make myself clear. Prior to June of 1951 there were both of these files available. I do not recall that I had occasion to go back and review either of those files in connection with the Vineland school. There was no issue presented, to my knowledge.

When the meeting concluded, I had thought that the entire matter was concluded. It was not until I returned to the agency in 1953 that I went through such files as were available.

Q. Well, how many times did you have these files brought to your attention up until June of 1951?

A. I don't believe I saw that file. The administrative file—I don't believe we had a file in the general counsel's office at any time prior to June of 1951. I don't believe I had occasion to look at the so-called administrative file but perhaps once.

Q. Which was on what occasion?

A. It may have been—I guess it must have been after I returned to the agency.

Q. You mean in 1953?

A. That is correct, sir.

Q. Are you now telling us that you never looked in either file prior to June of 1951? [755]

(Testimony of Manuel B. Hiller.)

A. Well, there was only one file that I know of prior to June, 1951. There was no file in the general counsel's office.

Q. Very well. Let's limit the question then to that one file. Are you now telling us you never looked at that file prior to June of 1951?

A. I don't recall.

Q. You have no knowledge one way or the other? A. No, sir.

Q. Do you know today that the information concerning the disposal of all of the three aircraft to Vineland was contained in that file?

A. Yes, sir; I have since so ascertained.

Q. It has been in that file at all times, let us say, from and after the date of disposal, as far as you know?

A. I don't know. I can't say how long it has been there.

Q. Well, let's say at least been in the files as far as you know at all times since the date of this meeting on April 4, 1951?

A. It may have been. I couldn't say any more.

Q. Would it be in the normal course of business to have been in that file? A. Yes.

Q. You have no reason to suspect otherwise then, have [756] you? A. No.

Q. Now, getting to this meeting of April 4th, did you make any notes of that conference after you had concluded it? A. No, sir.

Q. To you it was just simply a routine matter that you thought was concluded after the conference

(Testimony of Manuel B. Hiller.)

closed? A. I had so assumed.

Q. You had no reason to recollect it or remember it at any time until after you got back to the agency in 1953, is that right?

A. That is not so. I did have reason to recollect it. The meeting involved a rather unique situation, unique in the sense that it was composed of a private citizen who had come into a Government office, who was a layman and not a lawyer, as he indicated, and who argued questions of interpretation of regulations and legal documents with three lawyers who were present, Mr. Howard, Mr. Davidson and myself. And it is not a normal, not an everyday situation, and it just made an impression upon me.

Q. Well, when, if at all, did you first review this meeting with anybody?

A. Do you mean in my own mind?

Q. Yes. [757]

A. I guess it was about in the summer or early fall of 1951.

Q. And with whom?

A. A Mr. Hannings of the Federal Security Agency, who was a lawyer in the general counsel's office. He called me and he told me that the Finns had flown the plane away and that there might be some litigation and what, if anything, did I recall of my meeting with Mr. Finn and Mr. Bradley and the others. And at that time I reviewed my recollection of what transpired.

Q. Now, when he told you that, did you ask him

(Testimony of Manuel B. Hiller.)

whether or not he had called the Civil Aeronautics Administration and taken any steps with the C.A.A. to prevent any further transfer, or anything to that effect?

A. As I recall, he told me steps were being taken to refer the matter to the Department of Justice. I was not with the——

Q. My question was whether or not you asked him if he had called the C.A.A. or advised anybody over there not to further transfer the airplane until the matter had been ironed out, or anything to that effect?

A. No, sir.

Q. Did you ever regard that as a possibility?

Mr. Abbott: Objection, your Honor. That question is speculative. [758]

The Court: Sustained.

Q. (By Mr. Blackman): You yourself took no action to put the Civil Aeronautics Administration file on notice of any rights that the Government may have retained in the airplane, did you?

A. No, sir.

Q. Would it be in the course of your official duty to know if anybody else in the department had done so?

A. It might or might not.

Q. I will ask you whether you do know whether anybody else in the department took the matter up with the Civil Aeronautics Administration and asked them not to permit any further transfer of the airplane or anybody else's right from attaching the airplane?

A. To the best of my knowledge, I don't know.

(Testimony of Manuel B. Hiller.)

Q. And, as a matter of fact, this lawsuit was the first public notice with respect to the Government asserting a claim in this airplane, was it not?

Mr. Abbott: Objection. The witness isn't competent to answer that.

The Court: First public notice of which he knows?

Mr. Blackman: Of which he knows.

Mr. Abbott: The documents of the Civil Aeronautics Administration are before the court, marked for identification, although not in evidence. [759]

The Court: This is an inquiry as to this witness' knowledge, as I understand it.

Do you understand the question?

The Witness: I believe so.

The Court: You may answer. Do you know of any public notice of the Government's claim in this airplane prior to the commencement of this suit? Is that the question?

The Witness: Well, I recall some correspondence in the file. Whether that would be considered public notice, I don't know.

The Court: You mean the file of the Federal Security Agency?

The Witness: That is right.

Q. (By Mr. Blackman): Was there anything, to your knowledge, in the file of the Civil Aeronautics Administration which would give notice of the Government's claim to an interest in this claim in suit? A. Not to my knowledge.

(Testimony of Manuel B. Hiller.)

Q. And did anybody ever call to the attention of the agency for whom you rendered your services that International Airports had recorded a chattel mortgage on this aircraft on November 14, 1951?

A. I don't know whether the agency was so informed that a chattel mortgage had been given or recorded.

Q. You have reviewed this file of the Vineland School [760] District, have you not?

The Court: Which file?

The Witness: Yes.

The Court: Federal Security Agency file?

Mr. Blackman: Federal Security Agency file.

Q. (By Mr. Blackman): Have you ever seen anything in there to the effect that International had recorded a chattel mortgage on this airplane in November of 1951?

A. Well, upon my review of the file in 1953, upon my return to the agency, I did see something in the file to that effect.

Q. Did you find any correspondence in there where anybody in the Federal Security Agency attempted to communicate with International and put International on notice of the Government's right in this matter, if any?

A. No, sir.

Q. If there was any correspondence between the Federal Security Agency and the Civil Aeronautics Administration, do you know whether any of that correspondence was more than just inter-office correspondence?

A. I am sorry. I don't understand the question.

(Testimony of Manuel B. Hiller.)

Q. Well, let me ask you this: You are an attorney. You know what a *lis pendens* is, or anything similar? A. Yes.

Q. Was there any formal document filed in the Civil [761] Aeronautics Administration file which would be of the type that is considered properly registerable by the Civil Aeronautics Act of 1938, in the file of the aircraft in suit?

A. Not to my knowledge.

Q. All you know about is the possibility of some inter-office correspondence, is that correct?

A. That is correct.

Q. Do you know a Mr. Baxter? A. I do.

Q. What is his capacity?

A. At the present time?

Q. No; let's go back to 1951, in April.

A. I believe Mr. Baxter was then Chief of the Surplus Property Utilization Division. I hesitate only because the name was changed, and I am not—I can't recall now just as of what date the title was changed. I believe it was Chief.

Q. The Chief of the Surplus Property Utilization Division was one of those officers formally designated by the Administrator to release any alleged restrictions in these transfers, is that not true?

A. It was the office established to discharge the responsibility of the functions as established in the Federal Property and Administrative Services Act.

Q. Did you ever discuss this matter with Mr. Baxter?

(Testimony of Manuel B. Hiller.)

A. By "this matter," you mean the suit? [762]

Q. I am speaking now of the Finn transaction.

The Court: The airplane in suit?

Mr. Blackman: Yes, sir.

The Witness: No, sir; I don't believe I did.

The Court: Did you ever discuss the defendants Finn with Mr. Baxter?

The Witness: Yes, sir.

The Court: When was that?

The Witness: Upon my return to the agency in 1953.

Q. (By Mr. Blackman): Did Mr. Bradley tell you he had informed Mr. Baxter of the meeting of April 4, 1951? A. I don't recall. [763]

Q. In other words, you don't know what Mr. Bradley may have told Mr. Baxter, or what Mr. Baxter's reaction may have been; is that right?

A. That is correct.

Q. Whether he took any action or whether he failed to take any action, this is not a matter within your own personal knowledge; is that correct?

A. That is correct.

The Court: Did you ever discuss the airplane in suit with Mr. W. T. Frazier?

The Witness: Yes, sir.

The Court: When was that?

The Witness: It was since my return to the agency.

The Court: And not before?

The Witness: No, sir. I left, I believe it was,

(Testimony of Manuel B. Hiller.)

around the end of May or the beginning of June of 1951.

Q. (By Mr. Blackman): And when Mr. Finn asked you in this conference of April 4, 1951, "What did I get for my money," your statement to him was that he obtained the right to scrap the airplane?

A. I said, I believe, that at the very best he obtained the right to scrap the airplane and sell it for its basic material content.

Q. And that was your opinion at the time, was it, sir?

A. Yes, sir. [764]

Q. Is that still your opinion?

A. Yes, sir.

Mr. Blackman: No further questions.

The Court: Now, let's not repeat anything that was covered in the other cross-examination.

Mr. Nelson: I will try not to, your Honor.

Cross-Examination

By Mr. Nelson:

Q. Mr. Hiller, is it my understanding that when you left the meeting with the Finns on April 4th, that you did not thereafter check into this matter until you returned to the agency in 1953?

A. That is partially correct, sir. I did not check into the matter. I took no affirmative action to check into the matter because I thought, as I said before, that the matter was concluded at the end of the conference. When I returned to the agency, there was already pending, I believe, the present lawsuit.

(Testimony of Manuel B. Hiller.)

The Court: You returned to the agency in 1953?

The Witness: That is correct.

Q. (By Mr. Nelson): And when you did return to the agency and checked into this matter, you did so by referring to two files, as I understand, the General Counsel's file and the Federal Security Agency file; is that correct? [765]

A. That is correct.

Q. There are three agencies, are there not, which have the right—I will reframe that.

Is it your understanding that there are three agencies which have the right to give releases of these restrictions on educational property? Is that correct?

A. No, sir; that is not my understanding.

Q. You heard the testimony earlier this morning that the Administrator of the Federal Security Agency——

The Witness: Oh, three agencies. I thought by "agencies" you meant agencies rather than persons or individuals.

Mr. Nelson: That would be my error.

The Court: Who are the three?

Q. (By Mr. Nelson): I will name them, and see if this is correct: The Administrator of the Federal Security Agency, the Director of the Office of Field Services, and the Director of the Surplus Property Utilization Division?

A. The Chief of the Surplus Property Utilization Division. That is correct; those are the three.

Q. And any one of them had the right to make

(Testimony of Manuel B. Hiller.)

the releases that we are referring to in this action; is that right?

A. Subject, of course, to the right of the General Services Administrator to receive a 30-day notice, in [766] accordance with the requirements of the Act, and to express his disapproval of any proposed action in the way of a release.

Q. And if he did not make such an expression, would it just automatically be approved?

A. After the lapse of 30 days, that is correct.

Q. Now, did you check the files of all three agencies that we have referred to, the Administrative Agency, the Office of Field Services, and the Surplus Property Utilization Division, in making your determination as to whether or not any releases have been given?

A. To my knowledge, there are no such three sets of files. There is one set of files which is kept by the Surplus Property Utilization Division and the General Counsel's files.

Q. Did you check with the Office of Field Services or the Surplus Property Utilization Division as to whether or not they had made such a release at this time?

A. Yes, sir.

Q. And what was their answer?

A. There had been no such release given.

Q. And with whom did you check in such instance?

A. With Mr. Frazier, Chief of the Division.

Q. And Mr. Frazier, of course, is the man that replaced Mr. Baxter, is he not?

(Testimony of Manuel B. Hiller.)

A. That is correct. [767]

Q. You did not check with Mr. Baxter himself, who was the Administrator at the time that these questions came up with the Finns?

A. No, sir; but I would believe that the file would reflect any release that had been given by Mr. Baxter or anyone else qualified or authorized to issue such a release.

Q. Are you referring now to the file of the Surplus Property Utilization Division?

A. No, sir; the General Counsel's office files would reveal it. Any release would be drawn, in the normal course of business, by the General Counsel's office for execution by any one of the three authorized persons named.

Q. If that happened, they sent a copy of that to you; is that correct? A. Pardon?

Q. It is possible, is it not, that these matters could have been taken care of by that particular division, and a copy not sent to your office?

A. Well, sir, it is possible, but instruments, releases and all kinds of legal documents were drawn by the General Counsel's office and not the Surplus Property Utilization Division. That is a part of our job responsibilities, to prepare legal instruments and documents, and if any such document were drawn, in the normal course of business it would have been drawn by the office of the General [768] Counsel pursuant to a request there made by the Surplus Property Division.

Under those circumstances, there would be a copy

(Testimony of Manuel B. Hiller.)

of the document and the original request memorandum made to the General Counsel's office in the files of the Office of the General Counsel.

Q. Do I understand that the General Counsel makes such a document in each individual instance that a release is requested, or is there a form of such a release?

A. No; we grant individual releases in individual cases.

Q. Can you say that in this instance one of these other agencies, the Administrator or Surplus Utilization or Field Services, could not have drawn up their own release and given it, without having sent a copy to your office?

A. I would say it is extremely unlikely.

Mr. Nelson: No further questions.

The Court: The Mr. Baxter whom you have mentioned was, at the time of this April, 1951, conference, one of the three officials authorized and empowered to give releases, was he?

The Witness: Yes, your Honor.

The Court: He is the man who Mr. Bradley testified as being his superior at that time?

The Witness: That is correct, sir.

The Court: Any further questions of Mr. [769] Hiller?

Do you have any cross-examination on behalf of the defendants Finn?

Mr. Charles C. Finn: Your Honor, there is a difference here, and is it possible to express an opinion without the jury staying?

(Testimony of Manuel B. Hiller.)

The Court: The question is, do you wish to ask any questions of this witness on cross-examination? That is a very simple question.

Mr. Charles C. Finn: I understand that, your Honor, but I would like to ask the court a question first, and I am afraid——

The Court: I don't want to hear anything. I just asked a question, if you wish to ask any questions. You are here representing yourself, and your brother is not representing you. One of you cannot represent the other. You each must represent yourselves.

Mr. Charles C. Finn: I appreciate that.

The Court: That is the only right you have. You may both appear through one attorney, but you both may not appear here, one representing the other.

Mr. Charles C. Finn: I appreciate that, your Honor, but in view of the circumstances this afternoon——

The Court: Do you wish to ask any questions of this witness?

Mr. Charles C. Finn: I hesitate to let my brother ask [770] any questions.

The Court: He isn't asking on your behalf. What he does does not bind you.

Mr. Charles C. Finn: I appreciate that, but it binds him, and it has this afternoon.

Mr. George C. Finn: Your Honor, I have no hesitancy.

The Court: Very well. You may ask questions.

(Testimony of Manuel B. Hiller.)

I want to take this occasion to tell the jury with respect to this matter of offers in compromise.

People may offer settlement of a lawsuit for a dozen different reasons. For example, the figure that was mentioned here this afternoon would not, I don't suppose, pay the expense of the Government in bringing these witnesses out here and keeping them here three or four or five days, much less the expense of this trial. So you are not to consider any statement of that sort, and what the Government may have been willing to pay in settlement of this case is absolutely immaterial. As I say, there may have been a dozen reasons. The law does not permit an offer of compromise to come before the court or the jury. The court is not even entitled to hear it in a case tried by the court, and the jury is not entitled to hear it, because if offers of compromise were received in evidence, I doubt if one would ever be made. You would be afraid to make an offer of settlement in a lawsuit to a lawyer for fear he would tell the jury. That is the reason [771] I reprimanded the defendant George Finn for bringing that matter up here, and you are to disregard it entirely, because, as I say, it has nothing whatever to do with the merits of this case.

The same way with all of these colloquies between court and counsel. The comments of the court and counsel are not evidence in the case, as I told you at the outset, unless they are made as a part of an agreement or stipulation by counsel on all sides that certain facts are true.

(Testimony of Manuel B. Hiller.)

You may proceed, Mr. Finn.

Cross-Examination

By Mr. George C. Finn:

Q. You stated that in the conference Mr. Howard stated that there was a registerable interest in this airplane. Did you determine and did he determine what that registerable interest was?

A. No, sir; we didn't.

Q. Did you determine, Mr. Hiller, that that was a partial interest or a total interest?

A. As you will recall, we made no attempt to ascertain what the nature or extent of the interest was which Mr. Howard thought was sufficient upon which to base a registration.

He had expressed himself as saying that under the Civil Aeronautics Act he thought that this would be adequate and [772] that he would be constrained to recommend that the aircraft be registered.

He had also at the same time indicated that whatever action CAA might take in connection with the registration of the aircraft, that that would have no effect upon the actual ownership or right in and to the property.

Q. Mr. Hiller, what is it that is registered?

A. Nationality is my understanding of what the registration provides.

The Court: By "nationality," you mean nationality or citizenship of the person who claims to own the plane?

(Testimony of Manuel B. Hiller.)

The Witness: That is correct, sir.

The Court: Whether he is an American, a Mexican, or a Peruvian, or whatever it is?

The Witness: That is correct, your Honor.

Q. (By Mr. George C. Finn): Mr. Hiller, in answer to that question, do you imply that a Mexican who owned an airplane and registered it in the United States, it would be a Mexican airplane?

A. I wouldn't undertake to say, sir.

Q. Mr. Hiller, in order to obtain a registration, what must be produced?

Mr. Abbott: Objection, your Honor. First, we have gone through this. Secondly, this witness is not competent to testify upon the registration procedure. He is an employee [773] of the Federal Security Agency.

The Court: Sustained.

Q. (By Mr. George C. Finn): At this meeting, Mr. Hiller, what was it that we discussed to register? What did we propose to register with the Civil Aeronautics Administration?

A. Well, it was your proposal, Mr. Finn, that the ownership of the title of the aircraft, as you asserted it to be, in yourself would be registered with CAA.

Q. Yes, sir.

A. It was the position of the Federal Security Agency people at the meeting that you had acquired nothing; that, at best, perhaps you had acquired a right to reduce the plane to scrap, if it had not already been done so, and then dispose of it as scrap.

(Testimony of Manuel B. Hiller.)

Q. But the thing we were actually registering with the CAA was the title, was it not, and the chain of title?

A. Well, I don't know, Mr. Finn, what you had planned to register with CAA, or what you had planned to submit to CAA.

Q. Well, Mr. Hiller, summarizing this that we are talking about, when I registered this aircraft, now, I would have to comply with the CAA regulations, would I not?

Mr. Abbott: Objection, your Honor. It is self-evidence he would have to comply with that Service's regulations.

The Court: Sustained. [774]

Q. (By Mr. George C. Finn): Are you aware that the CAA regulations require for an unregistered airplane that a chain of title must be submitted as proof of ownership before a registration can be granted? Are you aware of that?

A. Yes, sir.

Q. Isn't that what we were registering with the CAA, Mr. Hiller?

Mr. Abbott: Objection, your Honor. The witness has already testified he doesn't know what happened.

The Court: Sustained.

Q. (By Mr. George C. Finn): In our discussion to obtain the registration, weren't we to resolve the chain of title to be registered with the CAA, and wasn't it this chain of title that Mr. Howard said

(Testimony of Manuel B. Hiller.)

represented the interests that the Finns had to register the airplane for?

A. My recollection was that the discussion was concerned almost entirely with what right or interest the school acquired under the Form 65 agreement.

Now, that may have had a part or a place in connection with registration of an aircraft with CAA insofar as it represented a link in a chain of title, but we were not then immediately concerned with registration. We were then concerned with a delineation of the legal effect and the consequences of the registration and the Form 65 agreement.

Q. That wasn't my question, Mr. Hiller. The question [775] was: Was it not in our discussion to determine whether or not we had something to register with the Civil Aeronautics Administration?

The Court: You mean, is that what you talked about? Is that what you want to ask?

Mr. George C. Finn: That was our total discussion, to determine could we register this airplane.

The Court: If you will ever stop, probably he can answer your question. You have now asked two or three questions in one.

Mr. George C. Finn: Yes, your Honor.

The Court: Do you understand the question?

The Witness: I am not sure now, sir.

The Court: Did you talk about what he could register, if anything?

The Witness: Yes, sir.

The Court: Put your next question.

(Testimony of Manuel B. Hiller.)

Mr. George C. Finn: Pardon me. Did he say that is what we were going to register, the chain of title?

The Court: He said you talked about what you could register, if anything.

Q. (By Mr. George C. Finn): Was it not Mr. Howard's statement that this chain of title that we had discussed in this meeting could be registered with the Civil Aeronautics Administration? [776]

A. He had so expressed himself.

Q. Thank you. Now, you stated that registration was not proof of ownership except in a court. What does registration mean, Mr. Hiller?

Mr. Abbott: Objection, your Honor. That is a misstatement of the witness' testimony.

The Court: Sustained. It may be stricken, and I instruct the jury to disregard it.

Mr. Charles C. Finn: Your Honor, in view of your instructions, I wish to consult with my brother and see if I could terminate this questioning.

The Court: You may.

Mr. George C. Finn: It won't be necessary, your Honor.

The Court: Your brother is representing himself, and you are representing yourself. Just sit down, please.

Q. (By Mr. George C. Finn): Mr. Hiller, what does registration represent?

Mr. Abbott: Objection, your Honor. That is a matter of law.

The Court: Sustained.

Q. (By Mr. George C. Finn): Mr. Hiller, can

(Testimony of Manuel B. Hiller.)

an airplane be sold, to the best of your knowledge, without a registration certificate?

Mr. Abbott: The same objection, your Honor.

The Court: Sustained. [777]

Q. (By Mr. George C. Finn): To the best of your knowledge, Mr. Hiller, were any of the Government aircraft—well, are you acquainted with the Civil Aeronautics Act of 1938?

A. I have only——

The Court: Sustained. I will instruct counsel to object to these immaterial matters.

Mr. Abbott: I will do so, your Honor.

The Court: It does not matter whether he is familiar with the Act or not.

Q. (By Mr. George C. Finn): Does registration apply to civil aircraft, Mr. Hiller?

Mr. Abbott: Objection. That is a matter of law, your Honor.

The Court: Sustained. That is all a question of law. We are trying to get the facts now, not the law.

Q. (By Mr. George C. Finn): Mr. Hiller, you stated that you returned to the Federal Security Agency in 1953, and you left in June of 1951. When you returned in 1953, did you make any search of the Civil Aeronautics' files for this policy letter that we discussed? A. No, sir.

Q. When did you make that search, Mr. Hiller?

A. About two weeks ago.

Q. About two weeks ago? [778]

A. Yes, sir.

Q. You didn't make any search in 1951?

(Testimony of Manuel B. Hiller.)

A. No, sir.

Q. You didn't make any search in 1953?

A. No, sir.

Q. And you didn't find any letter at all when you made your search; is that correct?

A. I found the one letter of January, 1952, which is marked in evidence. I don't remember which exhibit it was.

The Court: Can you agree upon the exhibit?

Mr. Abbott: Plaintiff's 11, I believe, your Honor.

The Court: Plaintiff's Exhibit 14 or 15, or is it Exhibit 11?

Mr. Abbott: I believe the reference is to Plaintiff's 11, your Honor.

The Court: January 2, 1952?

The Witness: That's right, your Honor.

The Court: Your next question.

Q. (By Mr. George C. Finn): Now, when you were a member of the Federal Security Agency, that letter did not exist, did it?

A. Not to my knowledge.

Q. So that any policy letter that may have existed in 1951 would not have resulted from any search that you made; is that correct? [779]

Mr. Abbott: Objection, your Honor. There is no foundation here. It assumes matters not in the record.

The Court: Sustained.

Mr. George C. Finn: Your Honor, the impression I gathered——

The Court: He said he left the agency in 1950.

(Testimony of Manuel B. Hiller.)

Is that correct?

The Witness: 1951, your Honor.

The Court: In 1951, and the letter is dated in 1952.

Mr. George C. Finn: Yes, your Honor. We are searching for a letter dated in 1951, which no one has admitted its existence. Now, did anybody look for it?

The Court: Ask him.

Q. (By Mr. George C. Finn): Did you ever look for any letter of 1951 in the Civil Aeronautics' files?

A. I caused a search to be made of the CAA files.

Q. How did you cause that search to be made?

A. I communicated with the people of the Civil Aeronautics Administration.

Q. Who did you talk to?

A. A Mrs. Morrow.

Q. Did you talk to a Miss Margaret O'Neil?

A. No; Miss Margaret O'Neil was in Europe at the time.

Q. Do you recall in the conference, that Miss Margaret O'Neil was present at that [780] conference? A. Yes.

Q. Do you recall any reference to a policy letter that Miss Margaret O'Neil had in her files?

A. No.

Q. You never asked Miss Margaret O'Neil whether she had such a letter subsequent to 1953,

(Testimony of Manuel B. Hiller.)

when you caused your search to be made; is that correct? A. That is correct.

Q. Were there any discussions, Mr. Hiller, as to a statute of limitations, regarding the expiration of restrictions on aircraft after being in possession of schools for three years? A. Yes, sir.

Q. What was that discussion, please?

A. As I recall, you were urging that the proper interpretation of the Form 65 agreement was that at the expiration of the three-year period the aircraft could then be disposed of by the school for any purpose whatever, and without consent of any government agency, and we took direct issue with you upon that interpretation.

Q. Do you remember on what that statement was based, the three-years' statute of limitation was based? Was it upon a regulation?

A. I believe it may have been.

Q. Was it Regulation 4, dated January 3, [781] 1946, appearing in the Federal Register on that date, do you recall?

A. I recall a War Assets Regulation 4, dated some time in May of 1946, but not in January.

Q. Did you ever see a regulation dated January 8, 1946? A. I may have.

Q. Do you recall whether or not the regulation dated in May rescinded the regulation dated January 8th?

Mr. Abbott: Objection, your Honor. That is a question of law.

(Testimony of Manuel B. Hiller.)

The Court: Sustained. As to any discussion, you are asking?

Mr. George C. Finn: Yes, your Honor.

The Court: You are asking if he recalls any discussion on that subject?

Mr. George C. Finn: Yes, your Honor.

The Court: Overruled. You may answer.

The Witness: I don't recall.

Q. (By Mr. George C. Finn): You do recall there was a discussion as to the statute of limitations based on the regulation?

A. Well, I recall that there was a three-year period mentioned both in the regulation and in the Form 65 agreement. It is not what I would characterize as a statute of limitations.

Q. Do you recall the original Regulation 4, which stated that aircraft must be disposed of only as scrap, and [782] then only after they shall have been reduced to their basic material content?

Mr. Abbott: Objection. The witness' recollection of the regulation is immaterial.

The Court: Sustained.

Mr. George C. Finn: I have the regulation, your Honor, if I may present it.

The Court: It is a matter of law. If the regulation is valid, it is the same and has equal dignity with the statute itself. It is a matter of law.

Mr. George C. Finn: Thank you, your [783] Honor.

Q. Do you recall that we raised the question that the original regulation, having been rescinded, was

(Testimony of Manuel B. Hiller.)

carried forward in the agreement and did not comply with the Regulation 4, as amended? Do you recall we had that discussion?

A. I am not sure that I understand what you mean by "the agreement carrying forth the regulation."

Q. Two regulations, the original one and the amended one. In the original regulation no three-year period was stated and forever all airplanes must be scrapped and reduced to their basic material content.

And then came an amended regulation which rescinded the original regulation and in addition stated aircraft acquired by schools would be disposed of but resold to others within three years of acquisition, and if scrapped, without approval of the disposal agency—words to that effect. Do you remember that?

A. I remember that the War Assets Regulation 4, in effect at the time that the Vineland School District acquired the aircraft in suit, was one which provided that property acquired under the regulation, or aircraft acquired under the regulation shall be sold only for scrap; that if the sale were within three years then the consent of the disposal agency must be obtained.

Q. That was in the agreement, wasn't it?

A. That was in the regulation. [784]

Mr. George C. Finn: May I read the regulation, your Honor?

(Testimony of Manuel B. Hiller.)

The Court: The regulation is a matter of law. Proceed.

Mr. George C. Finn: We seem to have a——

The Court: You aren't getting anywhere.

The Witness: I think I recall the more precise language of the regulation provided that acquired property shall be sold, when sold shall be required to have the consent of the disposal agency, unless sold for scrap after being mutilated.

Q. (By Mr. George C. Finn): And wasn't there a three-year—mention of three years in that regulation? A. I believe there was.

Mr. Abbott: Objection, your Honor. The question goes to a matter of law.

The Court: Sustained. You can sit there and discuss the regulation for five days with him and it won't change the regulation.

Mr. George C. Finn: The questions that we had in this conference, this discussion——

The Court: I don't want to hear from you. Put your next question. We have been over the conference enough. We aren't advancing it any with this.

Mr. Charles C. Finn: If it please the Court, I may discuss this for a moment——

The Court: Sit down. [785]

Q. (By Mr. George C. Finn): Mr. Hiller, in all of our discussions with the Federal Security Agency in your office, and with Mr. Bradley, everything was open and aboveboard, was it not?

A. Yes.

(Testimony of Manuel B. Hiller.)

Q. Nobody attempted to hide anything?

A. Not to my knowledge.

Q. And any files that were available, we could have asked for them and they be put on the table; everything open and aboveboard, is that correct?

A. I would think so.

Q. And you discussed this whole situation that we had in that office with Mr. Frazier?

A. Yes.

Q. Did you tell Mr. Frazier the same thing, that we had at this discussion, that everything was discussed open and aboveboard?

A. I believe so.

Mr. George C. Finn: May I refer to an exhibit, please?

The Court: When did you have this talk with Mr. Frazier?

The Witness: After my return to the Federal Security Agency.

The Court: 1953?

The Witness: Yes, sir.

The Court: What exhibit are you looking for? Perhaps [786] we can help you.

Mr. George C. Finn: I am looking for my C.A.A. file on the N-111H.

The Court: On the aircraft in suit?

Mr. George C. Finn: Yes, your Honor.

The Witness: I think this is it, sir.

The Court: The witness states he thinks he has it before him there. Perhaps you better look.

There was an Exhibit U, Civil Aeronautics Ad-

(Testimony of Manuel B. Hiller.)

ministration file, introduced today involving the so-called hulk.

Mr. George C. Finn: I have it, your Honor.

The Court: What is the designation? Exhibit what? What exhibit is it, Mr. Clerk?

The Clerk: It is K-1, -2, -3, -4, clear up to K-22.

The Court: Very well. Stand at the lectern and put your question. Or, if you wish the document placed before the witness, the clerk will place it before the witness.

Mr. George C. Finn: S for identification. Your Honor, I have here S for identification. I would like to have the witness——

The Court: Do you wish it placed before the witness?

Mr. George C. Finn: Yes.

The Court: Hand it to the clerk and the clerk will place it before the witness.

Please conduct your examination from the lectern. What [787] question do you wish to put to the witness?

Q. (By Mr. George C. Finn): Mr. Hiller, would you identify the document, please, as stated in Exhibit S, and what it purports to be?

A. It purports to be a letter written by Mr. Frazier, Chief of the Surplus Property Utilization Division, to the Civil Aeronautics Administration, dated May 7, 1952.

The Court: Did you ever see it before?

The Witness: I don't recall. I will have to read it first, sir. I may have read it, sir.

(Testimony of Manuel B. Hiller.)

Q. (By Mr. George C. Finn): Do you recall having read it? You may have read it?

A. I may have read it. It may have been in our files.

Q. It may have been in your files. Would you care to read—I believe, the second paragraph of that?

Mr. George C. Finn: May I examine it, your Honor?

The Court: You may.

Any objection to the offer of the letter in evidence?

Mr. Abbott: No objection, your Honor.

The Court: Stipulated to be genuine and in all respects what it purports to be?

Mr. Blackman: So stipulated.

The Court: It may be received in evidence if you wish to offer it, Mr. Finn. Do you wish to offer the letter?

Mr. George C. Finn: Yes, your Honor. [788]

(The document referred to, marked Defendants Finn Exhibit S, was received in evidence.)

The Court: It is in evidence now.

Mr. George C. Finn: May I ask the witness to read the second paragraph, your Honor?

The Court: Have you read the second paragraph, Mr. Hiller?

The Witness: Yes, sir.

The Court: The witness has read the second paragraph. What is your next question?

(Testimony of Manuel B. Hiller.)

Mr. George C. Finn: Read it out loud, your Honor.

The Court: No. We can all read it. We don't have to have him read it. The jury can take it to the jury room and you can read it to the jury in your argument.

Q. (By Mr. George C. Finn): Did you supply any information to Mr. Frazier to the effect that the contention stated in that second paragraph was the contention of the Federal Security Agency?

A. No, sir. I discussed that matter with Mr. Frazier, as I recall, for the first time only after my return to the agency in 1953. This letter is dated May 7, 1952.

Q. Would you state, Mr. Hiller, that the information contained in that paragraph is presently your contention?

Mr. Abbott: Objection, your Honor. The witness' contention is immaterial. [789]

The Court: Sustained. Lawsuits are made of contentions. We are interested in facts.

Mr. George C. Finn: This contention of the Federal Security Agency——

The Court: It doesn't matter whose contention it is. We are interested in facts, not contentions.

Q. (By Mr. George C. Finn): Is there anything, Mr. Hiller, in connection with this subject aircraft in suit that sustains such a contention stated in paragraph 2?

Mr. Abbott: Objection, your Honor.

The Court: Sustained.

(Testimony of Manuel B. Hiller.)

Q. (By Mr. George C. Finn): But you didn't supply any information whatsoever, any kind, nature, manner or form that would lead Mr. Frazier to believe, to represent the contention of the Federal Security Agency as stated in paragraph 2?

A. I believe that is so.

Q. You didn't supply anything. Did you supply anything to the contrary that would refute statements made in paragraph 2?

Mr. Abbott: Your Honor, this is immaterial. We object to it on the ground.

The Court: Sustained.

Mr. George C. Finn: That is all, your Honor.

The Court: Any further questions of Mr. Hiller? Any [790] redirect?

Mr. Abbott: No redirect, your Honor.

The Court: You may step down, Mr. Hiller. You are excused.

(Witness excused.)

The Court: Any further rebuttal by the Government?

Mr. Abbott: We do, your Honor. We would like to next offer into evidence Defendants Finn Exhibits 7, 8, 9 and 10.

The Court: Defendants Finn Exhibits?

Mr. Abbott: Correction, K-7, -8, -9 and -10.

The Court: Any objection to Finn Exhibits K-7, -8, -9 and -10? Those exhibits are on page 4 of the list at lines 8 to 14, Mr. Clerk, the list of exhibits filed October 27, 1954.

Mr. Blackman: Could we be heard at the proper time?

The Court: You have an objection to the offer?

Mr. Blackman: Yes, your Honor.

The Court: I suggest you withdraw that and offer it at another time.

Mr. Abbott: May I withdraw it until the end of the afternoon session?

The Court: Yes. Is there anything further? Do you have any more witnesses to call?

Mr. Abbott: Yes, your Honor.

The Court: How long will the examination [791] take?

Mr. Abbott: Direct examination will take approximately one hour.

The Court: One hour?

Mr. Abbott: Yes, your Honor.

The Court: Cut that in half and we will hear him tomorrow morning at 9:30.

Mr. Abbott: I will do my best to reduce it, your Honor.

The Court: 30 minutes. We have to put some limit on this, going over and over on this.

We will take the recess at this time. Is there any objection by any member of the jury to reconvene at 9:30 tomorrow?

Then, before we separate, I would admonish you of your duty not to converse or otherwise communicate amongst yourselves or with anyone else upon any subject touching the merits of this trial and not to form or express an opinion on this case

until after it has finally been submitted to you for your verdict.

You are now excused until tomorrow morning at 9:30.

(Whereupon the jury retired from the courtroom.)

The Court: Let the record show that the jury have retired from the courtroom.

What is the objection to the Government's offer in evidence of Exhibits K-7, -8, -9 and -10? Those are Defendants Finn Exhibits K-7, -8, -9 [792] and -10.

Mr. Blackman: If the court please, the offered exhibits relate to letters, interdepartmental letters of the Federal Security Agency and the Civil Aeronautics Administration which appear in the file of the aircraft in suit.

The Court: Whose file?

Mr. Blackman: The Civil Aeronautics Administration file of the aircraft in suit.

The Court: Let me interrupt you. What is the purpose of the offer? Perhaps we should have that first.

Mr. Abbott: The very inference, your Honor, which could be conceivably drawn from the line of cross-examination from Mr. Blackman, is there was no action by the Government with respect to the flight or operation of the aircraft in suit by the defendants Finn. The four documents offered, which are a part of the official file, and in fact they have been duly certified by the Administrator and fur-

nished under certificate to the defendants Finn, and are equally available to any member of the public, and are a part of the official file maintained with respect to the aircraft in suit. Those documents show on their face the Civil Aeronautics Administration was taking action, and the inference may be drawn, at the instance of the Federal Security Agency, to give notice to the world, and possibly to stop the flight of the aircraft in question.

Mr. Blackman: May I be heard on that, your Honor? [793]

The Court: Yes. I will understand your position better knowing the Government's purpose.

Mr. Blackman: What counsel has overlooked stating and bringing out is that those letters and messages are in no way binding upon anyone. They are nothing but interdepartmental correspondence between those two agencies.

According to the Civil Aeronautics Administration Act of 1938, only specified types of documents may be filed which constitute recorded notice to the world, and those documents are set forth. Counsel is aware of the fact that these documents are not of the type which are specified in the Act. Counsel, I feel, is also aware of the fact that they are acknowledged in the manner required by the Act so as to be entitled to recognition and that without a statute which expressly makes them documents which are notice to the world, they can have no such significance. Therefore, as interdepartmental correspondence and memoranda, they are binding upon no one here at this trial that I know of. I have no

question of their authenticity, but they are not binding upon the defendant International Airports, Inc. The Act speaks for itself in that regard.

Mr. Abbott: Counsel perhaps overlooks the fact, your Honor, he has brought out on cross-examination of Mr. Hiller that Mr. Hiller knew of no action taken by the Federal Security Agency to ask the Civil Aeronautics Administration to do [794] something about the registration of aircraft or prevent its flight, or that Mr. Hiller knew of no particular action within the Civil Aeronautics Administration, thus creating the inference in the mind of the jury that no one in the Government has done anything, until the lawsuit is filed; whereas, the proper documents show a great deal was done.

The Court: The objection is overruled. Defendants Finn Exhibits C-7, -8, -9 and -10 are received in evidence.

Mr. Abbott: Thank you, your Honor.

(The documents referred to, marked Defendants Finn Exhibits C-7, -8, -9 and -10, were received in evidence.)

Mr. Blackman: Your Honor, may we have an instruction to the jury to the effect that the law does not make those documents recorded notice to the world?

The Court: You may submit an instruction, any instruction you wish. You draft it and submit it tomorrow morning at the opening of court, and I will entertain it. I expect to instruct the jury fully

upon all the issues of law. But don't leave it to me to draft the instruction.

Mr. Blackman: I never have. I certainly intend to draft such an instruction.

The Court: I expect you all to burn a little midnight oil and go over this special verdict, and I want to hear any objections you have, or any corrections, at 9:30. If I don't hear from you then, I won't hear from you later on the subject. [795]

Mr. Abbott: May we at that time also, your Honor, submit any objections to proposed instructions?

The Court: You may. I had hoped to have by now the copies of some of the proposed instructions. It may be that my secretary will have them, if she doesn't have them now, she will have them the first thing tomorrow morning.

Now, is there anything further?

Mr. Abbott: There is one further matter, your Honor. I understood Mr. Nelson would propose the stipulation relating to the statutes under which the School District has been organized.

The Court: I suggest you gentlemen work them out and propose them in front of the jury.

Now, this reception of evidence just made, you will wish to renew that tomorrow morning in the presence of the jury. Evidence should be received, of course, in the presence of the jury. I shall expect you to remember to offer it.

Mr. Abbott: I will do so, your Honor.

Mr. Blackman: For the sake of the record, may

we state the grounds of objection, being hearsay, and no proper foundation laid?

The Court: You will have an opportunity to state your objection. You may state your objection in the presence of the jury. If you do not restate it, I will assume that you still reserve it. [796]

Mr. Nelson: If the court please, I have a supplement to our memorandum of law in answer to this estoppel argument which has come in, which I would like to file with the court at this time.

The Court: Very well. You may. Have you served counsel and all the parties?

Mr. Nelson: May the record show we are serving counsel at the present time, your Honor, and also parties, the defendants Finn?

Mr. Abbott: May the Government also serve a reply memorandum of law, your Honor?

The Court: You may.

Mr. Abbott: And file it.

The Court: Gentlemen, don't give me any more dim carbon copies. There is just no excuse for that. If you have any dim carbon copies which are hard to read, keep them and let your secretary read them.

Mr. Abbott: I am now serving each counsel, and parties not represented by counsel.

The Court: I should reject this brief of the Government. I have told your office that any time any document is written with this elite typewriter, which should be abolished, they should be written entirely in caps. This is a fairly clear copy. Now, I shall undertake to read it.

Mr. Abbott: We appreciate that, your Honor. We are [797] taking steps to replace the old——

The Court: You tell your stenographer to put it on caps and leave it on caps. They can't throw those elite typewriter out completely.

Mr. Abbott: They are being replaced.

The Court: Do you know what that does to a human being's eyes that has been working all day? Just look at it. It is enough to make your eyes cry just to look at it, much less read it.

Anything further, gentlemen?

George Finn, you may come to the bar, now, and show cause why you should not be held in contempt of court. You may stand at the lectern.

Mr. George C. Finn: The only thing I can say, your Honor, is that I had no intent, any manner, shape or form, to show any contempt to the court. I have nothing but respect for the court, your Honor, and I have always had respect. And I hope I have always showed respect for the court.

The Court: Well, of course, the question is here whether you did that designedly and intentionally to get before the jury in an improper manner the fact that, if it be a fact, that the Government had offered you some sum in compromise.

Mr. George C. Finn: No, your Honor. I had no intent of that at all. I was trying to clear up what appeared to me on the stand an insinuation that I had offered a bribe [798] to Mr. Bradley at this meeting, and in order to identify such an insinuation was impossible and ridiculous, I wanted to point out to Mr. Bradley that I wouldn't offer him

\$2,000 if I wouldn't have, after two years or a year of litigation, I wouldn't even accept the offer of the Government to give me \$2,500, get my airplane back and cancel the \$198,000 lawsuit. This is the impression I wanted to carry to Mr. Bradley, that if he had any thought in his mind, and any affidavit that were supplied to the Government, to the respect that I offered to pay money for a bill of sale that would allow me to register an airplane, that it was ridiculous.

The Court: You wish to be sworn and take the stand?

Mr. George C. Finn: Yes, your Honor.

The Court: I am not compelling you. You may if you feel so advised.

Mr. George C. Finn: Yes, your Honor.

The Court: Very well. You may come forward.

Mr. George C. Finn: May I make a statement prior to that?

The Court: Yes.

Mr. George C. Finn: Your Honor, I had learned some two months ago, whether it was what we call scuttlebutt or rumor, that the Government had an affidavit that I offered Mr. Bradley, or offered someone in Washington, \$2,000 to get this [799] airplane.

The Court: A bribe?

Mr. George C. Finn: Yes, your Honor.

The Court: I haven't heard any suggestion about it.

Mr. George C. Finn: It is outside, though, your Honor, where I got my information.

The Court: So, you can answer here in the presence of the jury?

Mr. George C. Finn: No, your Honor. I didn't concern myself with the jury. I concerned myself only with Mr. Bradley, the presentation and insinuation, and I still maintain that if we look at the record we will discover there is an insinuation in the record I offered Mr. Bradley the money——

The Court: Has the Government made any contention?

Mr. Abbott: Never, your Honor. And this is the first time it has occurred to me that Mr. Finn might so construe the evidence. Certainly it was never intended to suggest that Mr. Finn made the offer to Mr. Bradley in his individual capacity, but only as a Government officer who Mr. Finn thought would accept the money on behalf of the Government.

The Court: You wish to take the stand?

Mr. George C. Finn: In the last statement, I offered to check the record as to the question asked by Mr. Abbott while I was on the stand. "Did you ever offer Mr. Bradley?"—and I believe it was Mr. Bradley or a Government official, words to that effect —"\$2,000"? [800]

The Court: I recall the testimony very well. But I didn't understand it was even suggested that it was a bribe.

Mr. George C. Finn: The question was, to me, suggestive, and based upon the fact that I had heard rumors that an affidavit had been presented that I had offered this to a Government official, and

that it would be presented in court, I was aware of it when it was presented.

The Court: The Government makes no such contention and disavows any such contention. I haven't heard anyone else make any suggestion about it. I heard the testimony. I received no such suggestion or intimation from the testimony.

Mr. George C. Finn: I may be a little hypersensitive as to certain actions taken by the Government, and I propose that I can prove that equal misrepresentations were made in the past.

The Court: You wish to take the stand?

Mr. George C. Finn: Yes, your Honor.

The Court: You may be sworn if you so desire.

GEORGE C. FINN

called as a witness in his own behalf, being first sworn, was examined and testified as follows:

The Clerk: State your name.

The Witness: George C. Finn.

The Clerk: Will you be seated, Mr. Finn? [801]

The Court: Do you wish to interrogate the witness?

Mr. Abbott: I will endeavor to.

Direct Examination

By Mr. Abbott:

Q. What is your age, Mr. Finn? A. 40.

Q. What is your formal education?

A. Four years of college, three years medical school and the Air Force, six and a half years.

(Testimony of George C. Finn.)

Q. Will you state briefly what experience in litigation you have had?

A. I have been in court every day, it seems. I mean——

Q. Passing over the litigation which concerns us here, the United States vs. Finn, what other litigation have you participated in?

A. I was charged with contempt of court and tried and acquitted. I was charged with the Dyer Act, transporting stolen property across the state line, in foreign commerce, namely, C-46 aircraft, to the Republic of Mexico. And they failed to return on those. I was charged with assault, impeding and intimidating a Federal officer, and found [802] guilty.

Q. Was that a trial before a jury?

A. Yes, sir.

Q. Have you been in civil litigation in the eastern part of the United States? A. Yes, sir.

Q. What actions did you participate in in the eastern part of the United States?

A. An attorney tried the case. I didn't participate, unless——

Q. As a party?

A. As a party, in an action on a C-47 aircraft.

Q. Were you yourself present in court during that proceeding? A. Yes, sir.

Q. Was that tried by a jury or by the court?

A. No, sir; by the court.

Q. Were there one or two actions relating to a C-47 tried in Connecticut, Mr. Finn?

(Testimony of George C. Finn.)

A. One action.

Q. Was there any second action relating to that same airplane?

A. No, sir; not that I recall.

Q. Was there an action in which you participated entitled "George Finn vs. Roosevelt Field"?

A. That was the same action. [803]

Q. Was there an action in which you participated entitled, "George Finn vs. Mansdorf, et al."?

A. That was the same action.

Q. Were there two separate trials?

A. There was only one trial.

Q. Was there any other judicial proceeding in which you have been a party, that you haven't described to the court?

A. I don't think so. I don't recall any.

Q. Mr. Finn, when you made the statement, in substance or effect, that the Government had offered \$2,500 in settlement of the action in suit, were you referring to an offer to yourself, or to some other party?

A. Well, that offer was made through a conglomeration of parties. It included a boiling down of offers made. I believe Mr. Blackman made an offer to help settle this suit. I believe that there was Clyde Downing involved. There was an offer by a Congressman to take a third of the airplane. Well, there was an offer by—

Q. I am referring to the offer, Mr. Finn, which you have described.

A. This was boiled down.

(Testimony of George C. Finn.)

The Court: We are talking about the offer referred to in the presence of the jury.

The Witness: The \$2,500 was made in Mr. Binns' office.

Q. (By Mr. Abbott): To whom? [804]

The Court: Is that the offer you referred to before the jury this afternoon?

The Witness: Yes, sir.

The Court: That is the offer we are interested in.

Q. (By Mr. Abbott): An offer made by whom to whom, Mr. Finn?

A. Made by Mr. Binns to me on the basis of the prearrangements that were made through Clyde Downing, that finally got up to Mr. Binns' office. And he said——

Q. Now—pardon me. If you haven't finished, go ahead.

A. He said, or, I pointed out to him that these aircraft were sold for \$5,000.

He said, "Well, what about \$5,000? You owe the school \$5,000. We can get Mr. Blackman"—he didn't say "we can get Mr. Blackman—he said, "I believe Mr. Blackman had offered to loan the \$5,000"—this is my recollection of the conversation—"and we would discount it from the school," and since we hadn't paid the school, it really wouldn't cost us anything, providing the school went along with that.

And I said, "Why 5,000, Mr. Binns? I have proof, Mr. Binns, that these airplanes were sold for \$2,500."

(Testimony of George C. Finn.)

He said, "Well, if you can show me that, we will make it 2,500."

I said, "Then we will get the plane back, and cancel the [805] suit."

He said, "I will forward that on to Washington."

Q. Who was to pay the \$2,500 to whom, Mr. Finn?

A. They never got down to a concrete proposal, because I refused.

Q. Were you to pay or to receive the \$2,500?

A. To pay it, or no one offered me any money. They offered, I believe, the Government, that it could be settled by a payment commensurate with other aircraft that had been disposed of for that small amount.

And I said, "Well, now, I don't owe it. I did my business with the school, and if the Government has got any money coming, they can get it from the school."

Q. Mr. Finn, in the course of your experience in jury trials, have you observed that there are certain matters which are brought before the jury, and certain matters which are presented to the court in the absence of the jury?

A. Only one observation I made of that is when we had a jury trial. I only had one jury trial. That was in the criminal action, when we arrested Mr. Waters, and during the course of that trial the Government wanted to take some evidence out of—take some evidence out of the file, and they asked

(Testimony of George C. Finn.)

that the jury be excused, and they removed the evidence, and then brought the jury back in.

Q. Didn't you observe in the course of that trial on [806] many occasions that the court would excuse the jury in order to have certain matters presented to the court?

A. I don't recall that they did it more than one time.

Q. Weren't there several occasions when the jury was excused and arguments on evidence were made before the court—not evidence, but argument and proffers of evidence were taken up by the court?

A. I don't recall, but I do recall specifically that this evidence was removed from the file. I could not understand what was going on, and I said, "Gosh, they are taking the evidence out of the trial, and the jury isn't there."

Q. Mr. Finn, weren't there a number of occasions in the course of that prosecution for assaulting a Federal officer, when the jury was expressly excused by the court, so that the lawyers might properly present matters that the jury should not hear?

A. I can review the file.

Q. You were present during the entire trial, weren't you?

A. Yes, sir.

Q. And you observed everything that occurred?

A. Yes, sir.

Q. Did you hear your attorney argue a motion for dismissal of the indictment?

A. Yes, sir. [807]

(Testimony of George C. Finn.)

Q. At the conclusion of the Government's case?

A. Yes, sir.

Q. And was that argument before the jury?

A. I don't recall.

Q. You are in fact aware, are you not, Mr. Finn, that there are many matters which may not properly be presented to a jury in the course of a trial, and if they can be presented at all, they may be heard only by the court?

A. I believe that is true. I don't know what they are, though.

Mr. Abbott: I have no further questions, your Honor.

The Court: Didn't you know, before you made that statement in the presence of the jury this afternoon, that an offer in settlement was one matter that could not be brought before a jury?

The Witness: No, your Honor, I did not. I didn't know that couldn't even be brought into the courtroom. In fact——

The Court: It was your thought, was it, that any time any party offered to compromise a suit, even out in the hall, that it could be brought right in front of a jury and they be told about it?

The Witness: No, I didn't even consider it, your Honor. You say an offer of compromise?

The Court: An offer of settlement.

The Witness: These people have been talking to us about [808] settlement, not compromise.

The Court: Didn't you tell the jury this afternoon——didn't you state in front of the jury that the

(Testimony of George C. Finn.)

Government had offered you \$2,500 in settlement?

A. I believe I used the word "settlement," did I, "to settle this case"? Yes, I believe I said that, yes, your Honor.

The Court: Didn't you say the Government offered to pay you \$2,500?

The Witness: No, sir. That it was offered for me to pay the Government. The Government never offered me anything.

The Court: You didn't state it either way, as I recall it, in the presence of the jury. You stated the Government offered to settle the case for \$2,500. Wasn't that, in substance, what you said?

The Witness: I meant to state, if I didn't say it—I don't remember exactly the words, but I mean what I had in mind was that the Government offered me to give them \$2,500, and then they would give me the plane back and cancel the lawsuit, and my position was that if I was to give the Government \$2,500, and wouldn't do so, why would I give this two or three thousand?

The Court: Is there anything further anyone wishes to present?

(No response.) [809]

The Court: Unless you wish me to decide this tonight, I shall not do so. I will think it over tonight, and I want the reporter to read to me precisely what you said. I was so amazed at the statement you made in the presence of the jury that I am not sure that I remember precisely what you

(Testimony of George C. Finn.)

said, but my understanding of it was that the Government was going to pay—under this transaction you mentioned, that the Government had offered to pay you \$2,500 in settlement of this case.

The Witness: No, your Honor.

Mr. Charles C. Finn: We might have taken that.

The Court: And instead of you offering to pay Mr. Bradley anything, that far from it the Government had offered you. In any event, the reporters' notes will tell the story, and unless you insist upon its being determined tonight, I will postpone it.

The Witness: Your Honor, I wish you would decide the thing in your own best judgment, and I am sure you will understand the problem. That isn't my problem.

The Court: Unless you wish it decided tonight, I will decide it tomorrow.

The Witness: Your Honor, whenever you wish to decide it. I don't wish it decided tonight for any reason whatsoever.

The Court: Very well. Then you will return tomorrow morning at 9:30. [810]

Anything further before court adjourns?

Mr. Abbott: Nothing further, your Honor.

The Court: The trial is recessed until tomorrow morning at 9:30.

(Whereupon, at 5:45 o'clock p.m., Wednesday, November 3, 1954, an adjournment was taken until 9:30 o'clock a.m., Thursday, November 4, 1954.) [811]

Thursday, November 4, 1954; 9:50 A.M.

The Court: Are there ex parte matters?

In the case on trial, let the record show the jury are present.

You may call the Government's next witness in rebuttal.

Mr. Abbott: At this time, your Honor, the Government renews the offer of Defendants Finn Exhibits K-7 through -10, K-7, -8, -9, and -10.

The Court: Is there objection?

Mr. Blackman: No objection. Your Honor, we have submitted instructions pursuant to the court's leave granted yesterday.

The Court: Very well. The exhibits offered are now received in evidence.

(The documents referred to, marked Defendants Finn Exhibits K-7 through K-10, were received in evidence.)

Mr. Abbott: Two of those four, your Honor, are short and immediately pertinent to the matters last covered in examination. May they be read to the jury?

The Court: Yes.

Mr. Abbott: Ladies and gentlemen, I am now reading from Finns Exhibit K-7, which appears to be a certified copy of a teletype written by the Civil Aeronautics Administration, [815] addressed to the Los Angeles office, originating in Washington and dated November 2, 1951.

"Please advise name and address registered

owner Curtiss C-46A, registration No. N-111H, Serial 1-232. This aircraft is one of the aircraft disposed of by Federal Government to Educational Institutions. Have reason to believe aircraft was sold illegally Arvin School, Arvin, California." Signed "Marshal, 6-583."

K-10 is a teletype written by the Civil Aeronautics Administration, originating in Washington, addressed to "C.A.A., Los Angeles," and reads as follows:

"Dated 11-6-51.

"Evidence of ownership by Vineland School District of Curtiss C-46A, Serial 1-132, N-111H, acceptable for purpose of registration, is on file. Controversies over the ownership of aircraft are not for determination by the C.A.A. but are for determination by a court of competent jurisdiction in accordance with the local laws. Reference Section 501(F) Civil Aeronautics Administration Act."

Those two documents read are accompanied by the certification of the Secretary of Commerce to the effect that they are documents on file with the Civil Aeronautics Administration relating to the aircraft in suit.

The Government now calls Mr. Batchelor in rebuttal. [816]

GEORGE E. BATCHELOR

called as a witness on behalf of the Government in rebuttal, having been previously duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Have you been sworn, Mr. Batchelor?

The Witness: Yes, sir.

The Clerk: What is your full name?

The Witness: George E. Batchelor.

The Clerk: George E. Batchelor. Be seated, please.

Mr. Abbott: May it please the court: Mr. Wallace is present in court, and we have agreed upon a stipulation. I now have authority for presentation of that stipulation to the court. For his convenience, would it be possible to present the stipulation now, or shall we wait until the recess?

The Court: I will leave that to you, gentlemen.

Mr. Abbott: We are prepared to do it now, your Honor, and I think it may be properly presented now.

The Court: Any objection?

(No response.)

The Court: Very well.

Mr. Abbott: It is stipulated by and between the plaintiff and the defendant, Seaboard Surety Co., that judgment to be entered in this cause shall provide, in part, that the [817] defendant Seaboard Surety Co., has no right, title or interest in or to

(Testimony of George E. Batchelor.)

the aircraft in suit, and it is further stipulated that said judgment shall also provide that the plaintiff shall not recover costs against the defendant Seaboard Surety Co., and that the defendant Seaboard Surety Co., shall not recover costs as against plaintiff. Is that satisfactory, sir?

Mr. Wallace: So stipulated.

The Court: Very well. The stipulation will be approved, and you gentlemen will reduce it to writing, and let your stipulation express disclaimer by the Seaboard Surety Co., and dismissal of the action by the Government as to the Seaboard Surety Co.

Mr. Wallace: Thank you, your Honor.

Mr. Abbott: It was felt, your Honor, appropriate to use the stipulation for judgment procedure in lieu of dismissal, and Mr. Wallace has agreed to that procedure. The result will be the same.

The Court: Do you wish an adjudication upon the merits?

Mr. Wallace: As against the Government, your Honor, Seaboard Surety Co. makes no claim or claims for or against any of these named defendants. We waive any claim to the airplane.

The Court: Very well. You wish to have an adjudication on the merits as to the interests? [818]

Mr. Wallace: That is satisfactory, your Honor.

The Court: That may raise some complications. I would suggest that you provide in the stipulation that Seaboard disclaims any interest in the airplane, on the chance that the court may adjudicate that

(Testimony of George E. Batchelor.)

it has no interest in the airplane, without costs. Limited to that, then, there is no attempt or apparent attempt on the part of Seaboard to say where the title is.

Mr. Abbott: That is my understanding, your Honor; simply that they disclaim, and that the court may in fact find it has no interest in the aircraft.

The Court: Very well. If you gentlemen will submit it in writing and present it to be approved.

Mr. Abbott: We will do so, your Honor, and I will represent to the court that the stipulation last made is made with the authority of the Attorney General.

The Court: Very well.

Q. (By Mr. Abbott): Mr. Batchelor, are you the only employee or agent of the defendant International who has dealt with the defendants Finn in connection with the aircraft in suit?

A. Well, I think that I have handled all the negotiations with them relative to this C-46 in suit.

Q. Both before and after August 31, 1951, sir?

A. To the best of my knowledge, yes, sir. [819]

Q. And even up to the present time; is that correct?

A. Yes, sir.

Q. And can you state—

A. Other than technical matters relative to specifications on the aircraft.

Q. But have all negotiations relative to possession of the aircraft been conducted by you, acting

(Testimony of George E. Batchelor.)

on behalf of International in your dealings with the defendants Finn?

A. I think so, yes, sir.

Q. Has there been at any time any consent by International, written or otherwise, to possession of the aircraft on the part of the defendants Finn after May 25, 1952?

A. Well, there has been no consent on the part of International to their possession of the aircraft up to approximately two weeks before they removed it from International's hangar.

Now, I am not sure of that date at this time, but it would be in the latter part of May or the first part of June.

Q. Was there consent on the part of International to waive brief periods of possession in the month of May on the part of the defendants Finn?

A. They were given permission to do some work on the airplane outside the hangar, but they signed a statement that was to the effect that they acknowledged International had [820] and retained possession of the airplane.

Q. And what was the approximate total duration of their possession or actual physical possession pursuant to that arrangement?

A. Well, I don't—I am no attorney, but we didn't consider that they had possession. The plane was still on International's property, and we gave them permission to work on it, and to be in and around it, and those periods of time, well, I would

(Testimony of George E. Batchelor.)

say they were all within intervals of a period of three weeks, approximately.

Q. There has been testimony in this cause that the aircraft was removed to another point on the air strip at Burbank on May 25th. Has International ever consented to possession of the aircraft by the Finns—— A. No, sir.

Q. ——after that time? A. No, sir.

Q. You are confident that if such consent occurred, it would be known to you?

A. Yes, sir.

Q. Are C-46A aircraft still in use commercially?

A. Yes, sir.

Q. Are they widely used? Well, let me put the question this way: Flying Tigers use a large number of C-46As at the present time, do they not? [821]

A. No, sir.

Q. Do they use C-46s? A. Yes, sir.

Q. Does Slick use C-46s? A. Yes, sir.

Q. And there are other companies which at the present time are using C-46s, Mr. Batchelor?

A. No, I wouldn't say—you see, there are two different types of C-46s. There is the -A and -D, which is considered one type, and the -E and -F, which are another type; and the -A and -D are only approved for a take-off weight of 45,000 pounds, where the -E and -F are approved for 48,000.

Well, on freight runs the Slick and Tigers use all -E and -F. In fact, I think they are all -Fs. To my knowledge, the Tigers have only one C-46A or -D aircraft.

(Testimony of George E. Batchelor.)

Q. Is that in commercial use? A. Yes, sir.

Q. Was it your intention in August of 1951, when you were dealing with the Finns, to lease the aircraft in suit, and to operate it commercially?

A. We were going to sub—it was our intention to lease it from the Finns, and then to sublease it to other operators that we could sign a contract with to do all maintenance work on the aircraft.

Q. Yes. And those sublessees, those other operators [822] would, according to your intention as of that time, use the aircraft for commercial purposes; is that correct? A. Yes, sir.

Mr. Abbott: No further questions of this witness, your Honor.

Cross-Examination

Mr. Nelson: If the court please, we would like at this time to request permission of the court, while Mr. Batchelor is on the stand, to reopen for approximately five questions concerning damages, which have just come to our attention, in submitting the School District's case.

The Court: Very well. You may reopen the Vineland Elementary School District's case in chief for that purpose.

Mr. Nelson: Thank you, your Honor.

Q. (By Mr. Nelson): Mr. Batchelor, you have testified earlier as to your knowledge of the subject aircraft and its condition, have you not?

A. Yes, sir. [823]

(Testimony of George E. Batchelor.)

Q. You did see the aircraft in suit in 1950 on a visit to the School District?

A. Yes, sir, twice.

Q. You made a formal and detailed inspection of the aircraft at International when it was landed there by the Finns? A. Yes, sir.

Q. Can you give us an estimate of the valuation that you would place upon that aircraft as a commercially salable aircraft on February 28th of 1951?

Mr. Abbott: Objection, your Honor. This witness has not been shown to have the qualifications to testify as to that point of time.

Mr. Nelson: I believe, your Honor, that the fact that this particular witness has inspected the aircraft, both in and out, when it was landed in October of 1951 at his field, and the fact that he looked over the plane in 1950 would give him excellent qualifications for those purposes. He has seen the plane as it was used at the School District, and also as it was when it was flown in, and he had more opportunity than any other experts provided by any party here to know the exact condition of the aircraft and the work done by the Finns on the plane.

The Court: The objection is to any showing as to his qualifications as to the time stated. [824]

Perhaps you can lay a better foundation. If there is any doubt as to the foundation, I would surely lay it.

Mr. Nelson: It just appeared to me that the

(Testimony of George E. Batchelor.)

record has already set such foundation, and I didn't want to go into it in detail.

The Court: Please read the pending question, Mr. Reporter.

(The question was read.)

The Court: Do you have an opinion as to the fair market value of the airplane in suit as of that date?

The Witness: Yes, sir.

The Court: That is what you want to ask him?

Mr. Nelson: Yes, your Honor.

The Court: What is that opinion?

The Witness: Between \$7,000 and \$8,000.

Q. (By Mr. Nelson): And would you state the basis for this opinion, Mr. Batchelor?

A. Well, prior to the Korean War C-46As and Ds in the condition of this aircraft had no value, and the Korean War started in the summer of 1950, and then there was a slow rise in the value of all aircraft. In fact, there was a lag until the four-engine aircraft were removed from operation in this country and put on overseas airlifts, and at that time the value of twin-engine aircraft increased greatly. And along in the winter, before the heavy flying [825] started in spring and summer, the value still hadn't increased too much. And the big jump in prices occurred in the summer of 1951; in the fall.

Q. Now, the valuation which you have testified

(Testimony of George E. Batchelor.)

as being your opinion here, was that based upon a commercially flyable aircraft?

A. No. That would be based upon the aircraft as I saw it the last time in 1950, but without any restrictions of any type on the title; one that could be used in commercial operation.

Mr. Nelson: That is all I have, your Honor.

Redirect Examination

By Mr. Abbott:

Q. Mr. Batchelor, when you talked with George Finn and Charles Finn in the month of August, 1951, you and they discussed the aircraft that you had seen at Vineland, and you recalled then the condition you had observed, is that correct, sir?

A. Yes, sir. And they told me they had done some work on the airplane, or were doing some.

Q. Did they tell you in August, 1951, they had done some work on the plane?

A. I said they told me they had done some work or going to do some work, or doing some. [826]

Q. Did they show you pictures of the aircraft then? A. My recollection is that they did.

Q. Did those pictures show the airplane to be in the condition which you had observed when you were at Vineland in 1950?

A. Well, I can't recall that to any great detail. I knew that the cost, there would be a large cost and a large amount of time spent in getting the airplane into a flyable condition, large cost in money

(Testimony of George E. Batchelor.)

and time, and fly it down to Lockheed Air Terminal. And our discussions included that.

Q. Do you recall whether or not the pictures shown to you in August of 1951, of the aircraft in suit, showed it to be in the same condition which you had observed in 1950?

A. No, I don't. I don't recall.

Q. It is true, however, that you offered \$55,000 for the aircraft in the course of that discussion of August, 1951, is it not?

A. My recollection is that it is not.

Q. Did you make any offer?

A. As I remember it, we offered \$50,000, delivered to Lockheed Air Terminal, and subject to our inspection at Lockheed.

Q. Did you agree with the testimony of the opinion previously given that the cost of putting that airplane in flying condition was \$5,000, Mr. Batchelor? [827]

A. I would think it would be slightly more than that, but not enough to quibble about.

Q. Isn't it true, sir, that in February of 1951, American troops were fighting in Korea and a large number of transport aircraft were being then used to carry munitions and supplies to Korea?

A. Not a large number.

Q. Wasn't there, in February of 1951, a search being made in the industry for transport aircraft to carry munitions and supplies to Korea?

A. Well, as I recall it, the big increase in value of aircraft occurred during the summer and fall of

(Testimony of George E. Batchelor.)

1951, and that caused the values to increase greatly. There was a lag in time there from the time the Korean War started until the transport planes got into—the operations were set up and operations commenced in the Korean air lift.

Q. When you said that the aircraft in question had no market or commercial value prior to the Korean War, did you mean that literally, that it wouldn't bring anything on the commercial market, Mr. Batchelor?

A. Well, practically nothing. I will put it that way.

Q. Then how is it that in 1950 you asked——

A. Well, wait. Let me—no, prior to the Korean War, I don't think they had any, no value at all. An A or a [828] D had no value except for, possibly, parts.

Q. Well, what value did they have for parts, Mr. Batchelor?

A. Oh, I imagine a thousand dollars, fifteen hundred dollars, \$2,000.

Q. Isn't it true that prior to the Korean War you made two separate trips to Vineland to inquire whether the aircraft in suit was for sale?

A. Well, my trips were, as I remember it, sometime in 1950. Now, I think it was about the time—the first trip possibly was just before the Korean War started, and I believe the second one was after it started.

Q. And both of them were prior to the American participation in the Korean War, were they not?

(Testimony of George E. Batchelor.)

A. Well, I don't know the exact dates involved there.

Mr. Abbott: No further questions, your Honor.

The Court: Anything further of Mr. Batchelor?

Mr. Nelson: No questions.

The Court: You may step down, Mr. Batchelor.

(Witness excused.)

The Court: The Government's next witness?

Mr. Abbott: The Government calls Charles Finn, your Honor. [829]

CHARLES C. FINN

called as a witness in rebuttal by the Government, being first sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Charles C. Finn.

The Clerk: Be seated, please.

Direct Examination

By Mr. Abbott:

Q. Will the clerk please place before the witness Defendants Finn Exhibit AX and Plaintiff's Exhibits 12-A and 12-B?

The Clerk: Here is Exhibit 12.

Q. (By Mr. Abbott): Calling your attention, first, to Finn Exhibit AX, Mr. Finn——

The Clerk: I haven't given it to him yet, Mr. Abbott.

Mr. Abbott: Oh, I am sorry.

(Testimony of Charles C. Finn.)

Q. (By Mr. Abbott): Well, calling your attention to 12-B, Plaintiff's Exhibit, do you have that before you, Mr. Finn? A. Yes, sir.

Q. There appears on that document what purports to be your signature and that of your brother. Are those, in fact, your signatures?

A. This is 12, did you say? [830]

Q. Yes.

A. I have got Exhibit 12. I don't see the B.

Q. It is a small document entitled, "Application for Registration." A. Yes.

Q. Dated April 9, 1951. A. Yes.

Q. Is your answer yes, those are your signatures, your signature and your brother's signature?

A. Yes, sir.

Q. And you are familiar with your brother's signature and able to identify it, are you not?

A. Yes, sir.

Mr. Abbott: The Government offers in evidence Plaintiff's Exhibit 12-B.

The Court: Is there objection?

Mr. Nelson: No objection.

Mr. Blackman: No, your Honor.

The Court: Received in evidence.

Mr. Blackman: I understood all of Plaintiff's 12 was in evidence.

The Court: My notes so show. What do your minutes show, Mr. Clerk?

Mr. Abbott: If I may be heard on that, your Honor, Plaintiff's 12 was a single document attached to Civil [831] Aeronautics Administration

(Testimony of Charles C. Finn.)

certificate, which certifications covered several other documents not previously put in evidence.

The Clerk: I just have 12 in evidence.

The Court: Do you have any lists showing these exhibits you are speaking of now?

Mr. Abbott: The exhibit list is up——

The Court: The exhibit list which was to be kept up to date was not kept up to date.

Mr. Abbott: Your Honor, we filed an exhibit list which was brought up to date yesterday.

The Court: Where is this morning's?

Mr. Abbott: It is being prepared by my secretary and will be brought here as soon as it is finished. She has been working on it since coming to work this morning.

The Court: Is this on any list, the document you offer now?

Mr. Abbott: It is not on any typewritten list. It is a document that appears on counsel's list.

The Court: By "counsel," you are referring to your own?

Mr. Abbott: Mine, and I have displayed it to other counsel.

The Court: Is there objection to the offer?

Mr. Blackman: No objection.

Mr. Nelson: No objection. [832]

The Court: Received in evidence.

(The document referred to, marked Plaintiff's Exhibit 12-B, was received in evidence.)

Mr. Abbott: At this time the Government offers

(Testimony of Charles C. Finn.)

Exhibit 12-A, affidavit of Peter Bancroft dated April 6, 1951.

The Court: Is that another document which appears only on some handwritten list you have?

Mr. Abbott: Each of these documents was marked yesterday, and the list is being brought up to date this morning to show——

The Court: I say, is this a document that appears on any list which the court has?

Mr. Abbott: No, your Honor. It appears on the list which will be presented to the court.

The Court: Very well. Any objection?

Mr. Nelson: No objection.

The Court: Received in evidence.

(The document referred to, marked Plaintiff's Exhibit 12-A, was received in evidence.)

Q. (By Mr. Abbott): Do you now have before you, Mr. Finn, Finns' Exhibit AX?

A. This is AX? Yes, I have.

Q. AX appears to be a photostatic copy of two documents on the same sheet, one of which purports to be a registration certificate. Do you recognize that registration [833] certificate as a photostatic copy of the original registration certificate on the aircraft described in this lawsuit as the hull?

A. Well, I haven't seen that registration certificate for a long time, but I believe it is. There is no reason to believe otherwise.

Mr. Abbott: We offer into evidence, your Honor, Finns' Exhibit AX. The offer is restricted to that

(Testimony of Charles C. Finn.)

portion of the photostat which displays the registration certificate.

The Court: Is there an objection to the offer?

Mr. Nelson: No objection.

Mr. Blackman: No objection.

The Court: It may be received in evidence.

(The document referred to, marked Defendants Finn Exhibit AX, was received in evidence.)

Q. (By Mr. Abbott): Mr. Finn, did you and your brother rehabilitate, or do some work directed towards rehabilitation of the aircraft we have described as a hull in this litigation, in the month of January and the month of February, 1951?

A. Well, we were rehabilitating that right along. Now, I think we started at the purchase of that airplane, which was in October of 1950, and we were working constantly to rehabilitate the airplane and put it in condition for flight purposes.

Q. In any event, work of that type, rehabilitation of [834] the aircraft we have called the hull, that occurred prior to April, 1951, had it not?

A. It occurred from the beginning of October—well, from the time we purchased it, on. Now, when I say “rehabilitation of the airplane,” we had to go around and get parts, and parts are difficult to find, and there is considerable time spent at all times. This was a project that we had which was in our minds constantly. While we may not have

(Testimony of Charles C. Finn.)

placed a part on every day, we were out looking for parts.

Q. I didn't ask you for detail of the work, Mr. Finn, merely some rehabilitation work was done on the hull prior to April, 1951, is that correct?

A. Yes, sir. It was done from October on.

Q. And by "October," do you mean October, 1950?

A. I believe that is the date on which we bought the plane.

Q. When you testified to rehabilitation work beginning in October, you mean October, 1950?

A. Yes, sir.

Q. Did you do any work on the plane in suit prior to the time that your brother George went to Washington, in February and April of 1951?

A. No, sir.

Mr. Abbott: I have no further questions, your Honor.

Mr. Nelson: No questions, your Honor. [835]

Mr. Blackman: No questions, your Honor.

The Court: You may step down, Mr. Finn.

(Witness excused.)

Mr. Abbott: The Government calls Peter Bancroft.

PETER A. BANCROFT

called as a witness in rebuttal by the Government, having been previously sworn, was recalled and testified further as follows:

The Clerk: You have been sworn, have you?

The Witness: Yes, sir.

The Clerk: Be seated, please.

Direct Examination

By Mr. Abbott:

Q. Mr. Bancroft, do you have a definite aircraft identified in your mind by the reference "hull," which has been used in the course of this litigation?

A. Yes, sir.

Q. Is that the only C-46 ever owned by the School District, other than the C-46 in suit?

A. The only other C-46?

Q. Yes.

A. Yes, sir. There are the two of them.

Q. Did you acquire the hull from the War Assets Administration [836] pursuant to the Surplus Property Act of 1944, as an educational transfer?

Mr. Blackman: Just a moment. If the court please, I believe that calls for an opinion and conclusion of this witness as to a matter of law.

Mr. Abbott: This is preliminary, your Honor. We can go through each step in the procedure, but the particular steps are not pertinent, only the general manner of acquisition of the aircraft.

The Court: Please read the pending question, Mr. Reporter.

(Testimony of Peter A. Bancroft.)

(The question was read.)

Mr. Nelson: If the court please, may the record show our objection joining with Mr. Blackman, and also, improper rebuttal and irrelevant and immaterial?

The Court: Sustained.

Mr. Abbott: May the Government be heard on the question of rebuttal and materiality? We feel this is a very important point.

The Court: It calls for a conclusion which this witness is not competent to express.

Mr. Abbott: May International's Exhibit T be placed before the witness, please? [837]

The Clerk: It does not seem to be here with the exhibits. Your Honor, I can't find International's Exhibit C.

Mr. Abbott: T.

The Clerk: Oh, T.

The Court: Couldn't this be arranged during a recess, Mr. Abbott, to find these exhibits, so that we don't have to sit here and wait for them to be found?

Mr. Abbott: I didn't anticipate the use of this exhibit would be necessary, your Honor.

The Court: Proceed.

Q. (By Mr. Abbott): Are you now viewing International's T, Mr. Bancroft? A. Yes, sir.

Q. Is that a document which you received at the same time that you received possession of this hull?

A. I am not certain if I received it at the same

(Testimony of Peter A. Bancroft.)

time, but it is in connection with the plane called the hull.

Q. Well, do you recognize it as a document that you received at or about the time that you received possession of the hull?

A. I don't recall when I received the document.

Q. Is it a document that you received from War Assets Administration in connection with the delivery of the hull?

A. Yes, sir.

Mr. Nelson: Objection, your Honor, to this line of [838] questioning on the ground that the method of acquisition and the means by which the District obtained the hull is not in issue in this case, and it is wholly irrelevant and immaterial, and is not proper rebuttal.

Mr. Abbott: May the Government be heard at this time, your Honor?

The Court: Yes.

Mr. Abbott: The purpose of the Government is this: We propose to show that the District received not one, but two completely flyable C-46s, and while the Government's damage is predicated upon the market value of the aircraft in suit, that, contrary to the position asserted in Vineland's case in chief, the Government is not made whole by its possession of the hull aircraft, for the Government contracted to have two complete and flyable C-46s in the possession of the District. That evidences the materiality of the inquiry.

Mr. Nelson: If the court please, I still don't see any materiality, particularly, as to the acquisition

(Testimony of Peter A. Bancroft.)

or means by which they obtained this aircraft. If the Government intends to show that the delivery of two aircraft to the District was the intention of the Government, it is a matter of argument, and, certainly, nothing to bring in and delay the proceedings in the trial.

The Court: Overruled. He may answer.

Mr. Abbott: Will you read the pending question to the [839] witness, Madam Reporter?

(The question and answer were read.)

Mr. Abbott: I didn't realize the answer had come in.

Q. (By Mr. Abbott): Among other things, International's T recites or represents or acknowledges payment of the sum of \$200. Was that sum in fact paid by the Vineland Elementary School District to the War Assets Administration?

Mr. Nelson: The same objection; immateriality, your Honor.

The Court: Overruled.

The Witness: Do you mean—would you rephrase that question, please, Mr. Abbott?

Q. (By Mr. Abbott): Did you pay \$200 to War Assets Administration in connection with the acquisition of the hull, Mr. Bancroft?

A. Our district did not pay \$200, no, sir.

Q. Was that sum paid— A. Yes, sir.

Q. —to the War Assets Administration in connection with the acquisition of the hull?

(Testimony of Peter A. Bancroft.)

A. Yes, sir, it was.

Q. At what point, geographically speaking, did you take possession of the hull?

A. At, I believe, Ontario, California.

Q. Was it flown from Ontario, California, to the [840] Vineland Elementary School District?

A. Yes, sir, it was.

Q. At the time that you took possession at Ontario, California, was the aircraft complete, including engines, instruments, and control surfaces?

A. Yes, sir.

Q. Were the engines, instruments, control surfaces, and other parts of the aircraft removed from it after its delivery at the Vineland Elementary School District?

Mr. Nelson: Objection, your Honor. I submit we are getting far afield. We are getting into irrelevant and immaterial matters. Where does this tie in to the Government's proof as to damage?

Mr. Abbott: I will be happy to explain.

The Court: What is the purpose?

Mr. Abbott: The purpose is this: The Government contends that the damage occasioned to the Government by the breach of contract alleged is the loss to the Government of the particular C-46A in suit for educational purposes. The contention of Vineland appears to be that the Government has not been damaged seriously, if at all, by that loss, because another C-46A was to have been substituted for the aircraft in suit by the defendants Finn.

The Government here shows, or will show, if

(Testimony of Peter A. Bancroft.)

permitted, that the Government placed two complete flyable C-46As in [841] the hands of the School District, both to be used for educational purposes, and that the net result of the transaction between the School District and the Finns is to leave the Government with but one aircraft for that purpose.

Mr. Nelson: If the court please, we will go along with everything that the Government has just stated. It is not the contention of the School District that the aircraft in suit is to be substituted with the other aircraft on the premises.

We agree that there are two aircraft involved, and that it was the intention of the Government that the two aircraft should remain. Our only contention as to damages is: just what was the Government damaged by the removal of the one aircraft, and has that removal occurred? It has nothing to do whatsoever with the other aircraft on the field. That aircraft still remains and is being used for educational purposes, and we do not intend ever to substitute the two.

The Court: Vineland contends that the net result if the defendants Finn comply, would be two aircraft, I take it?

Mr. Nelson: I don't follow the court.

The Court: Weren't the defendants Finn obligated under Vineland's theory to put another aircraft there to serve as a classroom?

Mr. Nelson: That is correct, your Honor. But not in this action are we contending that the replacement by the Finns of that aircraft is to take

(Testimony of Peter A. Bancroft.)

care of the damages which [842] the Government is alleging here. We still leave that open, if they can prove that the Government was injured, and we will go along with the fact that two aircraft were considered by the District.

The Court: Where is the other one?

Mr. Nelson: The other aircraft is in the District, your Honor.

The Court: What is the Government's theory? If the defendants Finn put another aircraft there, that there will not be two? I don't understand you.

Mr. Abbott: This is the Government's theory, your Honor: that before the defendants Finn arrived at the scene, sometime before, in fact, in 1948 the Vineland Elementary School District and the Government contracted for the placing of two complete and flyable C-46s, both suitable for educational purposes, in the hands of the School District. Sometime later the insides were removed from the one C-46, and it becomes a hull, stripped down to just the frame.

Mr. Nelson: We object to that as being a fact not in evidence, your Honor, and assuming something.

Mr. Abbott: Then there is a contract between the School District, on the one hand, and the Finns on the other for the sale of the C-46 in suit, which at that time remained in whole condition, and in reasonably good condition, and the Finns undertake to place a second C-46, the same C-46 that has [843] been at Vineland since 1948 in the condition in

(Testimony of Peter A. Bancroft.)

which the aircraft in suit was on February 28, 1951.

Then says Vineland, "How has the Government been hurt by the sale of the aircraft in suit, if they get another one?" And we wish to show the Government contracted for two complete aircraft.

The Court: There is no evidence to show what happened to the hull. There is no evidence to show the hull was ever anything but a hull.

Mr. Abbott: That is the evidence I would elicit, if permitted.

Mr. Nelson: That certainly is improper rebuttal, and we are not alleging here to the court in that respect that the Government is not damaged because we are getting this other aircraft back at all. If they can prove they were damaged by the removal of the subject aircraft, that is a separate and distinct matter.

The Court: Sustained.

Mr. Abbott: May the Government at the proper time make an offer of proof on this point?

The Court: Yes, the Government may make an offer of proof, or make the record on excluded evidence, pursuant to Rule 43(c), if so advised.

Mr. Abbott: Does the court desire that that record be made at this time? We are prepared to do so. [844]

The Court: It is up to the Government, whenever the Government seeks permission to make it. There is no need of detaining the jury for that. I don't expect to permit the jury to hear it.

(Testimony of Peter A. Bancroft.)

Mr. Abbott: Then we will make the record at the recess, your Honor.

Q. (By Mr. Abbott): Mr. Bancroft, will you recall again as to whether or not you had heard of the Form 65 agreement by that name prior to the time that this litigation began?

A. I can't recall hearing it by that title, no, sir.

Q. Are you certain that you have never heard of it by that title, sir?

A. I have heard of it during the court session here by that title.

Q. Prior to the commencement of this litigation?

A. No, I can't recall, no, sir.

Mr. Abbott: May the 11-page handwritten statement which I am now handing to the clerk be marked as Government's Exhibit 17, for identification?

The Court: It may be so marked.

(The document referred to was marked Plaintiff's Exhibit No. 17, for identification.)

Mr. Abbott: May I assist the witness to point to a particular passage in that rather long [845] document.

The Court: You may.

Q. (By Mr. Abbott): Mr. Bancroft, I am displaying to you Plaintiff's Exhibit 17, for identification, which appears to be a handwritten document of 11 pages, and bearing what purports to be your signature. Will you please examine that statement,

(Testimony of Peter A. Bancroft.)

and then state whether or not you signed the document in the form which it now bears?

A. Yes, sir, I signed this document.

Q. And does it appear to be in the same form which it bore at the time of that execution?

A. Yes, sir.

Q. I will call your attention particularly to the language in the middle of page 10, beginning with the words, "however, WAA Form 65," and ending with the words "in error" at the bottom of the same page, and ask you whether that language, in particular, was in the document and read by you at the time of your execution of the document.

A. Yes, sir, it was in the document, as is evident, and I read the document.

Q. Did you prepare that document, or did some other person prepare it?

A. I believe Mr. Chrisman. He is a special agent for the Federal Bureau of Investigation.

Q. Did he prepare the document in your hand? A. Yes, sir. [846]

Q. Was that preparation the result of a conference or interview with you?

A. Yes, sir, and I would like to make a statement on that. People who are familiar with these forms, and Mr. Chrisman must have been, in referring to a document by number, could refer to it that way, and I would obviously agree, but as to whether it were the agreement, No. 65, or any agreement, I don't think that is a point that I would remember.

(Testimony of Peter A. Bancroft.)

Mr. Abbott: May Plaintiff's 17 be admitted in evidence, your Honor?

Mr. Nelson: No objection, your Honor.

The Court: Received in evidence.

(The document, marked Plaintiff's Exhibit No. 17 for identification, was received in evidence.)

Mr. Abbott: May I read the portion referred to in the witness' testimony, your Honor?

The Court: You may.

Mr. Abbott: Now, reading from the middle of page 10 of Plaintiff's Exhibit 17, and I should preface this with a reference to the date, November 29, 1948:

"However, WAA Form 65 looks very familiar to me, and I am sure I must have signed one before we were ever able to buy any War Surplus material at such low prices, and for educational and [847] instructional purposes."

Q. (By Mr. Abbott): Mr. Bancroft, is the hull being used for educational purposes at this time?

A. Yes, sir, it is.

Q. Has it been refitted with engines and control surfaces?

A. It has been refitted with some surfaces, and engines, yes, sir.

Q. Is it being used as a schoolroom?

A. Only partly.

(Testimony of Peter A. Bancroft.)

Q. Are there desks and other classroom facilities in it?

A. I am not certain if there are now. I don't believe there are desks at the present time.

Q. Well, are classes, in fact, conducted in the hull, as they were in the aircraft in suit?

Mr. Nelson: Objection, your Honor, as to immateriality of this entire line of questioning.

The Court: Overruled.

The Witness: The hulk airplane at present isn't being used exactly in the same way as it was, in that we had seats and desks and had a formal classroom situation. We are using the plane now for the study of control surfaces, and we are actually doing some work on the aircraft, also by our students. [848]

Q. Are there instruments on that airplane, the hull? A. No, sir, there are not.

Q. In April of 1951 did you have dealings with the State Agency for Surplus Property, the California State Agency for Educational Use of Surplus Property?

Mr. Nelson: Objection, your Honor. It is irrelevant and immaterial as to whether he would have dealt with the State Agency.

Mr. Abbott: I can ask one question which may show the materiality.

Mr. Nelson: It is improper rebuttal, your Honor.

The Court: Sustained. Put your next question.

Q. (By Mr. Abbott): Mr. Bancroft, have you

(Testimony of Peter A. Bancroft.)

in your dealings in connection with surplus property acquisitions dealt with the California State Agency for Surplus Property——

Mr. Nelson: The same objection.

Q. (By Mr. Abbott): ——acting on behalf of the Federal Security Agency and other agencies of the United States?

Mr. Nelson: The same objection.

The Court: What is the purpose of it?

Mr. Abbott: Your Honor, I desire to show by this witness that, contrary to inferences that might have been drawn from the examination yesterday, there was an inquiry, a very prompt inquiry into the disposition of the aircraft in suit, [849] and to show——

The Court: Overruled. You may answer.

The Witness: We have conferred a number of times with the State people.

Q. (By Mr. Abbott): In general, in your conversations with the representatives of the California State Agency, they have related to the surplus property in the possession of the School District, have they not?

A. Surplus property generally, but not necessarily with regard to aircraft.

Q. Did you, in particular, have a conversation with Mr. Olson of that agency in the month of April, 1951? A. That I can't remember.

Q. Well, did you discuss with any representative of the State Agency the disposition of the aircraft in suit to the defendants Finn?

(Testimony of Peter A. Bancroft.)

A. That is quite possible.

Q. Isn't it a fact, sir, that such conversations occurred in the month of April, 1951?

A. That I can't say.

Q. Isn't it a fact that they occurred sometime in the spring of 1951? A. That I can't say.

Q. Well, do you recall any conversations with Mr. W. A. Farrell, Chief Surplus Property Officer of the State Agency [850] for Educational Use of Surplus Property in the spring of 1951, which conversations related to the disposition of surplus property in the possession of the School District?

A. Mr. Abbott, we have talked to scores of people in the agency and outside of the agency regarding these aircraft, and so far as comments or advice, that I couldn't say as to date, or when.

Q. Well, isn't it a fact, Mr. Bancroft, that in April of 1951, Mr. Olson contacted you to ask whether you had effected any sale of the aircraft in suit?

Mr. Nelson: Objection, your Honor, that is a question asked and answered. He has already stated he does not recall any such conversation.

The Court: Overruled. You may answer.

The Witness: It is possible that Mr. Olson did call, but I can't recall.

Q. (By Mr. Abbott): Now, if Mr. Olson did call, wasn't his call one relating to disposition of this aircraft in suit, Mr. Bancroft?

A. Mr. Abbott, I have stated that I don't have

(Testimony of Peter A. Bancroft.)

a memory by dates. Now, if you have information that I did talk to him, why don't you ask me?

Q. Well, I will ask you, then, did you at any time discuss with Mr. Olson the disposition of the aircraft in suit? [851]

A. That is quite possible.

Q. When? A. I don't remember.

Mr. Abbott: May the letter dated April 30, 1951, apparently signed by Peter A. Bancroft, be marked as Plaintiff's Exhibit 18, for identification, and be placed before the witness?

The Court: It may be so marked.

(The document referred to was marked Plaintiff's Exhibit No. 18, for identification.)

Q. (By Mr. Abbott): Will you examine Plaintiff's Exhibit 18, for identification, and state whether or not that is a copy of a letter prepared by you, and addressed to Mr. Farrell, Chief Surplus Property Officer, State Department of Education?

A. Yes, sir, I believe that's our letter.

Q. Does a review of that document refresh your recollection as to whether or not you did have conversations with Mr. Olson or Mr. Farrell of the State Department of Education Agency for Surplus Property in the month of April, 1951?

A. I don't think there is any question, as I stated, that I talked to him. I don't recall when.

Q. Can you tell by reference to that letter whether or not there were any conversations prior

(Testimony of Peter A. Bancroft.)

to the date of the letter, Plaintiff's 18, for [852] identification?

A. We must have been contacted by them, either personally or by letter prior to this letter of answer by us.

Mr. Abbott: May Plaintiff's Exhibit 18 be admitted in evidence, your Honor?

Mr. Nelson: We are going to object to the letter being admitted into evidence, your Honor, as being irrelevant and immaterial. Once again, I can see no connection between this and what the Government has offered to connect up as an investigation by a Federal Agency. [853]

Mr. Abbott: This is an investigation by the state agency acting on behalf of the United States, your Honor.

Mr. Nelson: There is no evidence to show that, your Honor, no foundation whatsoever.

Mr. Abbott: The witness himself has given us the evidence.

The Court: Let me see the document.

Mr. Abbott: As a second ground for materiality, the Government urges, your Honor, it bears upon the question of this witness' intention in connection with the transaction in suit.

Mr. Nelson: We submit, your Honor, that letter has nothing to do with the aircraft in suit.

The Court: The objection is overruled. It may be received in evidence.

(The document referred to, marked Plaintiff's Exhibit 18, was received in evidence.)

(Testimony of Peter A. Bancroft.)

Mr. Abbott: May the Government read the first paragraph of that document, which is short, your Honor?

The Court: You may.

Mr. Abbott: Letter dated April 30, 1951, addressed to Mr. W. A. Farrell, Chief Surplus Property Officer, State Educational Agency for Surplus Property, signed by Peter A. Bancroft.

“Dear Mr. Farrell: [854]

“At this writing all aircraft purchased by us from War Assets Administration, located on our Sunset School strip, is still being operated by us. None of these units are surplus to us, due to the fact we are still using them regularly.”

Q. (By Mr. Abbott): Isn't it a fact that this letter, Plaintiff's Exhibit 18, was prompted on your part by discussions with Mr. Olsen and Mr. Farrell of the state agency when they inquired whether or not you had disposed of any surplus property?

A. Yes, sir, it was.

Q. Weren't there further discussions in the month of November, 1951, between yourself and Mr. Farrell relative to the disposition of your surplus property in possession of the school?

A. Well, I will state again, there very possibly could have been discussions, but I don't know whether they were in November.

Q. Well, do you recall any discussion on that topic any time in the fall of 1951, sir?

A. Well, I will repeat. It is very possible I dis-

(Testimony of Peter A. Bancroft.)

cussed that matter with them, but I don't recall whether it was November or fall of 1951.

The Witness: Is this the court procedure, your Honor, to embarrass a witness with these questions? If he has the [855] information why doesn't he ask me if I wrote it?

The Court: If you don't remember, all you need to do is say so.

The Witness: Yes, sir.

The Court: Misrecollection is not an uncommon experience to any of us.

Let's move on, gentlemen.

Mr. Abbott: I am waiting, your Honor, for the document to be returned.

The Court: Mr. Nelson, you are only entitled to look at that long enough to have it pass under your observation so you may identify it, and not make a study of it.

Mr. Nelson: I did wish to read it, your Honor. It is my first view of the letter.

Mr. Abbott: May the letter of November 5, 1951, addressed to Mr. W. A. Farrell, signed Peter A. Bancroft, Superintendent, be marked as Plaintiff's Exhibit 19, your Honor? And may that document be placed before the witness?

The Court: It may be so marked.

(The document referred to was marked Plaintiff's Exhibit 19 for identification.)

The Court: Place the document before the witness, Mr. Clerk.

(Testimony of Peter A. Bancroft.)

Your question?

Q. (By Mr. Abbott): Is Plaintiff's Exhibit 19 a document [856] prepared by you, Mr. Bancroft?

A. Yes, it is.

Q. Was it prepared on the date which it bears, by you? A. Yes, sir.

Q. What is the date it bears?

A. November 5, 1951, your Honor.

The Witness: Yes, it is.

Q. (By Mr. Abbott): Was that document prepared as the result of a visit by Mr. Olsen of the State Agency to the Vineland Elementary School District? A. Yes, sir.

Q. Had Mr. Olsen, in the course of that visit, asked to look at any document or paper you might have relative to the disposition of the aircraft in suit? A. Yes, sir.

Q. And had you refused to give him access to those papers? A. Yes, sir, we did.

Mr. Abbott: May Plaintiff's Exhibit 19 be admitted into evidence?

The Court: Is there objection?

Mr. Nelson: The same objection, your Honor.

The Court: Overruled. It may be received in evidence.

(The document referred to, marked Plaintiff's Exhibit 19, was received in [857] evidence.)

Mr. Abbott: May that letter, which is quite short, be read by the Government, your Honor?

(Testimony of Peter A. Bancroft.)

The Court: Yes, it may.

Mr. Abbott: This is a letter dated November 5, 1951, addressed to Mr. W. A. Farrell, Chief Surplus Property Officer, State Department of Education, signed by Peter A. Bancroft.

“Dear Sir:

“The Vineland School District hereby wishes it known that they will provide access to any files owned by them pertaining to the recently disposed C-46 when it becomes apparent that it is necessary to provide access to these files. The reason for not wishing to disclose certain information at this time is because this information is valuable to the district as a business proposition and disclosure of this information would possibly not be to the advantage of the district. It is the full intention of the district to co-operate with any authorized agency on this matter.”

Mr. Abbott: The Government has no further questions, your Honor.

The Court: Any further question of Mr. Bancroft?

Mr. Nelson: No question, your Honor.

The Court: You may step down, Mr. Bancroft.

(Witness excused.) [858]

The Court: Any further rebuttal by the Government?

Mr. Abbott: The Government rests, your Honor.

The Court: Surrebuttal? All sides rest?

Mr. Blackman: No, your Honor. We have a very few questions of Mr. Batchelor.

Mr. George C. Finn: May I offer a stipulation, your Honor?

The Court: Speak up so we can hear you.

Mr. George C. Finn: May I offer a stipulation at this time?

The Court: You may.

Mr. George C. Finn: I offer to stipulate that in a congressional hearing in which Mr. Farrell participated, he made the following statement with regard to the disposal of the property in question——

Mr. Abbott: Your Honor, we object to the offer to stipulate at this time, and suggest——

The Court: Sustained. You may discuss it with counsel at the recess, and if they will agree to it you may make the offer. There is no necessity to make a statement and have counsel say, “We cannot stipulate.”

Mr. Nelson: If the court please, I am going to move at this time that all the testimony which has just been presented in connection with the hull be dismissed and stricken from the record, inasmuch as the Government never [859] did tie up the fact which he has stated was the reason for bringing in evidence before the court; and particularly, this matter of the state agency.

The Court: There is no need of detaining the jury to hear that motion. The motion will be denied at this time. You may renew it at some later time if you feel so advised.

Mr. Nelson: I will so do, your Honor.

The Court: Let's finish with the testimony, gentlemen.

GEORGE BATCHELOR

called as a witness in surrebuttal by defendant International Airports, Inc., having been previously sworn, was recalled and testified as follows:

The Clerk: What is your name, sir?

The Witness: George Batchelor.

The Clerk: You have previously been sworn?

The Witness: Yes, sir.

The Court: Proceed, Mr. Blackman.

Direct Examination

By Mr. Blackman:

Q. Mr. Batchelor, have you ever heard of a common reputation in your particular branch of the aviation industry to the effect that school aircraft were not permitted to be resold? [860]

A. No, sir.

Q. If there ever had been such a common reputation, were you in a position, or do you feel it would have come to your attention?

A. It normally should.

Q. And apart from a common reputation, have you ever heard of any school restrictions, restrictions on resale of aircraft owned by schools prior to the time that the Government first filed its lawsuit, or within a month or two before that time?

A. I heard a rumor, or something, about the time within—about a month after the time the airplane was removed from our hangar. Now, I have for-

(Testimony of George Batchelor.)

gotten the date the Government filed the lawsuit right now.

Q. The date of the lawsuit was July 3, 1952. The airplane was removed from International's hangar May 25, 1952. A. Yes, sir.

Q. All the work on the airplane had been done at that time, as far as International was concerned?

A. Yes, sir.

Q. It had been done since about the beginning of April, is that right? A. Sometime in April.

Mr. Blackman: No further questions. [861]

The Court: Any further questions?

Mr. Nelson: No questions, your Honor.

The Court: You may step down.

(Witness excused.)

The Court: Any further surrebuttal? Both sides rest? All parties rest?

Mr. Abbott: We rest, your Honor.

Mr. Blackman: Yes.

The Court: How much time does the Government wish for argument?

Mr. Abbott: A total of one hour, with opening and closing, if the opposition is given the same period.

Mr. Nelson: One hour will be sufficient for us, your Honor.

Mr. Blackman: That will be sufficient.

The Court: We will begin the arguments at 2:30 this afternoon. I don't propose to preclude the argument, so you gentlemen argue fully.

Are there any members of the jury who might be inconvenienced if we sat to 6:00 or 6:30 this evening?

I have to excuse you at this time because there are some other matters. You will be excused until 2:30 this afternoon. Before we separate I would admonish you again of your duty not to converse or otherwise communicate amongst yourselves or anyone else upon any subject touching the [862] merits of this trial and not to form or express an opinion on the case until after it has been finally submitted to you for your verdict.

You are now excused until 2:30 this afternoon, when you will hear the summation of counsel.

(Whereupon the jury retired from the courtroom.)

The Court: Let the record show the jury have retired from the courtroom.

Do you gentlemen have any suggestions with respect to the proposed interrogatories in the special verdict form?

Mr. Abbott: Would it be appropriate to make a record of excluded evidence with Mr. Bancroft, your Honor?

The Court: We will make that when the list of exhibits come, Mr. Abbott. It would be very appropriate to have it every morning, an up-to-date list of exhibits. If your secretary can't work at night and get it out—I must say, my secretary works at night to get the instructions done on this case. I asked for an up-to-date list of exhibits in the case

at all times, every day, and it should have been furnished.

Mr. Abbott: Your Honor, I have no power to require my secretray, who is a Civil Service employee, to work after 5:00.

I do have the exhibit list here at this time. I am filing the original and one copy of the second supplemental [863] exhibit list, and serving a copy on parties not represented by counsel, and counsel.

The Court: I will hear the offer of proof some other time. I want to take up this special verdict and get that settled, now.

(Thereupon, a discussion was had between court and counsel on the interrogatories submitted on the special verdict.) [864]

Friday, November 5, 1954—12:55 P.M.

The Court: Now, gentlemen, what about this counterclaim? Let's get rid of all the evidence we can in this case today. We don't want to make a career out of it. Is there any reason why we can't go ahead and take any additional evidence now that has to be taken on the counterclaim?

Mr. Abbott: I have Title 28, Section 2406, which provides for a manner in which the claim is to be made to the General Accounting Office——

The Court: I am familiar with the section. What is your point?

Mr. Abbott: Our point is that there is no provision there for a 15-day refusal, or an implied refusal based upon——

The Court: Have you looked at the regulations?

Mr. Abbott: I have not looked at the regulations at any time.

The Court: Well, I will consider that you made evidence of claim. I will consider the claim has been made and rejected.

Mr. George C. Finn: All right.

The Court: Do you have evidence that you made a claim?

Mr. Charles C. Finn: The slip is home, your Honor. [2*]

The Court: Can you have it here this afternoon?

Mr. Charles C. Finn: Yes, your Honor.

The Court: Very well. It is almost 1:00 o'clock. What time would you be ready to proceed this afternoon?

Mr. Charles C. Finn: I could be back in 45 minutes, your Honor.

The Court: Here is my view on that, gentlemen: If you are entitled to the counterclaim, you are entitled to the plane or its value. Now, assuming you are entitled, or assuming you get the plane back, if you are entitled to the value of the plane you are not entitled to anything for the use of the plane. In other words, you can't have the value of the property and the rental of it, too. If you get the value of the plane at the time it was taken from you, with interest, that is all you would be entitled to. Or, if you get the plane back, then you are entitled to the reasonable value of the use of it, the rental value during the period you were deprived of it.

Mr. Charles C. Finn: Yes, sir.

The Court: Now, when you rent something part of the cost of renting is the ordinary wear and tear on it, upon the use of it. So you don't get that plus the rental.

Mr. Charles C. Finn: Yes, sir.

The Court: But you make a claim in your counterclaim that the Government damaged it by extraordinary use or misuse, [3] neglect, by leaving it out exposed to the elements.

Mr. Charles C. Finn: Yes.

The Court: Now, in order to base any finding upon that we would have to find first if it is rust—is rust part of it?

Mr. Charles C. Finn: No, your Honor.

The Court: Let's use rust. You first have to find out how much rust would be due to ordinary wear and tear and how much of it was due to extraordinary neglect.

Mr. Charles C. Finn: I don't think it will be difficult to determine it, your Honor. And I don't—we are not going to ask for anything excessive. We don't believe in bleeding the Government and the people that have to pay for this. We want a fair and equitable judgment. That airplane has been in the wind and sand and dust. The amount of money it would take to get that out of there, the recovering of the airplane——

The Court: Well, if the airplane is returned to you it will be delivered to you. You won't have to go get it. There wouldn't be any question about that.

If a judgment is rendered in your favor on the counterclaim, it would be a judgment that the Government return the plane to you or pay you so much money; and it would be at the option of the Government. If the Government wants to keep the plane, why, they have bought it, in other words, from you.

Mr. Charles C. Finn: Your Honor, is there any possible way that we could relinquish any monetary consideration in [4] lieu of the plane? We want the airplane.

Mr. George C. Finn: Let me put it this way, your Honor: In that respect, if the airplane were returned to us in the condition it was taken from us there wouldn't be any necessity for requiring damages for wear and tear on it being out there in the dust. In other words, the Air Force has facilities for putting that airplane, probably more inexpensive than anyone else for their purposes, back into the condition in which it was taken from us. We don't ask that we get money. All we want is the plane back in the condition in which it was taken.

The Court: Very well. Perhaps if a judgment were rendered to that effect that would take care of your extraordinary wear and tear.

Mr. George C. Finn: Take care of it completely. In that same respect, when anyone leases an airplane, as in this lease we had with International, the conditions were that the plane be returned in the same condition in which it was——

The Court: The same good order and condition in which it was taken from you, ordinary wear and tear excepted.

Mr. Charles C. Finn: Yes, your Honor.

The Court: Because you are claiming rental value, you see, that means the Government would be buying the use of the plane during the period you have been deprived of it.

Mr. Charles C. Finn: Yes, your Honor. [5]

The Court: Whether they used it or not they were entitled to the benefit of ordinary wear and tear.

Mr. George C. Finn: Yes, your Honor.

The Court: I think that takes care of it. If a judgment were rendered in your favor it would be for the value of the plane at the time it was taken, or for a return of the plane in the same order and condition in which it was at the time it was taken from you, less ordinary wear and tear——

Mr. George C. Finn: Yes, sir.

The Court: ——and for the reasonable rental value of it during the period you were deprived of it.

There is no dispute as to the evidence of rental value, is there?

Mr. Abbott: Well, there are two points——

The Court: What is the evidence as to rental value? You told me several times there was a dispute, but I don't recall.

Mr. Abbott: The evidence was that in the condition in which the plane existed at all times, up to the present time, it had no rental value. But were the aircraft licensed for passenger use within the United States, and work necessary for licensing done

in the sum of \$50,000, it would have a rental value of \$5,000 per month.

The Court: Is the evidence that it had no rental value in the condition it now is? [6]

Mr. Abbott: Which it now is and has been at all times from the date of its taking.

The Court: Are you all agreed on that?

Mr. Nelson: We are very much agreed with that, your Honor.

Mr. Blackman: No, your Honor.

The Court: Is that the evidence?

Mr. Nelson: That was my understanding of the evidence, your Honor.

The Court: That is all I am asking. I am not asking whether you agree with the evidence. Is that the evidence?

Mr. Blackman: I believe there is evidence in the present state of the record which shows evidence to the effect counsel has stated it.

The Court: You may wish to call Mr. Batchelor on the rental value.

Mr. Charles C. Finn: I would like to cover one point which is the most important thing to us, after two years of dispute, and that is that we do want the airplane. And the privilege resting in the Government to pay for the plane or return it to us is quite an important issue. I don't know how that pertains to law, but if it is legally possible at all for that airplane to be returned to us that is our choice—if it is returned to us in the same condition in which it was taken. [7]

The Court: I will hear you on it. It may be that

the airplane is sufficiently unique that the court would have the power to order this specific plane to be returned to you.

Mr. George C. Finn: Thank you, your Honor.

Mr. Abbott: On the question of rental value as between the defendants Finn and defendant International, it was adjudicated that International has the right and has had the right to possession of the aircraft at all times from May 26, 1952, to the present time. So that even assuming——

The Court: Has it been finally adjudicated?

Mr. Abbott: There has been no evidence to the contrary in this action, your Honor.

The Court: Has it been finally adjudicated?

Mr. Abbott: The adjudication across the street is on appeal.

The Court: The judgment across the street is no final judgment; and until it is there is no final judgment as far as evidence of adjudication.

Mr. Abbott: Only in this record, at all times from May 25, 1952, to the present time, as between those two parties, International had the right to possession.

The Court: But the defendants Finn contend they had the right to possession. So I will have to take any evidence they may wish to offer as to the reasonable value of the use of the plane during that period if they claim they were entitled [8] to possession and were deprived of possession.

Now, will you be ready to proceed at 2:00 o'clock, or 1:30?

Mr. George C. Finn: Whenever you say, your Honor.

The Court: Well, apparently your brother will have to go somewhere and——

Mr. George C. Finn: He can be back by 1:30.

The Court: Can you be ready at 1:30, gentlemen?

Mr. Abbott: We would like to have it 2:00 o'clock, so we will have a chance to make contact with our witness.

Mr. Blackman: May I ask how long Mr. Batchelor will be used as a witness?

The Court: I shouldn't think it would take very long. We want his opinion as to the value of the use of this plane. As I understand it, the evidence as to the value of the plane has been given. I don't know whether Mr. Batchelor testified to it or not.

Mr. Blackman: I don't recall, your Honor.

The Court: He may be called upon to testify as to the reasonable value of the plane, the fair market value for cash at certain times of the plane—well, at the time specifically when the Government took possession of it.

Secondly, he may be asked to testify as to the fair market rental value of the plane during the period in which the defendants Finn have been deprived of the use of it. [9]

Now, I am not passing upon who is entitled to possession. There will be time enough to do that after the evidence is in. But I thought as long as we are here it seemed foolish not to take what bit of re-

maining evidence there is to be taken. And you wouldn't have to come back again, I trust.

Mr. Blackman: Thank you, your Honor.

Mr. Charles C. Finn: Your Honor, I think that your Honor will find this aircraft sufficiently unique so we wouldn't have to go into the value of the plane.

The Court: Well, you would want to make your record anyhow. If I find it unique the Court of Appeals might not find it unique. There is always that possibility.

Mr. Charles C. Finn: The word "unique" seems to cover the situation thoroughly.

The Court: Are there any available in the market?

Mr. Charles C. Finn: I think they have all been sold.

The Court: You see, unique items in law are items for which there are no duplicates, like an heirloom.

Mr. George C. Finn: This is an heirloom, your Honor.

The Court: Also, pieces of art.

You think it will be if this keeps up for many more years, is that it?

Mr. George C. Finn: Yes, your Honor.

The Court: Well, I hope before your grandchildren get around to it we will have it disposed of. [10]

Mr. Charles C. Finn: The factory has gone out of business, which would tend to make it unique.

The Court: Does the Government have any attitude on this? If the defendants prevail does the

Government intend to tender back the plane or the value?

Mr. Abbott: That is the very question I put to the representative of the Agency, your Honor, and I will try to get a quick answer to it. I don't think we can answer it right now, however.

The Court: Perhaps you can. That might shorten things.

We will reconvene at 2:00 o'clock then, gentlemen.

(Whereupon a recess was taken until 2:00 o'clock p.m. of the same day.) [11]

Friday, November 5, 1954—2:00 P.M.

The Court: Are there ex parte matters?

The Clerk: No, your Honor.

The Court: Case No. 14309, United States vs. George C. Finn and others. Are you ready to proceed on the counterclaim, gentlemen?

Mr. Abbott: The Government is ready.

Mr. George C. Finn: We don't have these exhibits marked yet. And we haven't discussed them with counsel. But we are ready to proceed otherwise.

The Court: Very well.

Has the Government any indication or offer of stipulation as to whether or not it would elect to return the plane—or, that is, to return the plane in the condition it was in at the time it was taken from the possession of the Finns, defendants Finn, ordinary wear and tear excepted; or whether the Government would elect to pay the value of it in

the event the judgment should be finally to that effect?

Mr. Abbott: We don't have that at this time, but we will undertake to prepare a written stipulation or written statement of the Government's intention and file it as soon as possible. Our inability to do so now should not interfere with the taking of evidence.

The Court: Very well. [12]

Mr. Charles C. Finn: One thing your Honor, the matter of establishing the value of the plane, will that be held over?

The Court: I want to hear any evidence you have. There has been evidence offered here. Mr. Dulie testified. You heard him testify at some length about it. There has been some evidence here that defendant International Airports offered \$50,000 or \$55,000 at one time. The allegation of your counterclaim is \$70,000, isn't it?

Mr. Charles C. Finn: Yes, your Honor.

The Court: So, I will hear your evidence on that. I will hear your evidence on the rental value, and the evidence as to any extraordinary or inexcusable wear and tear on the part of the Government since the plane has been in the possession of the Government.

Mr. Charles C. Finn: I think it more proper to start with the value.

The Court: Just as you gentlemen wish.

Mr. George C. Finn: We will start with the lease of the airplane then.

The Court: You wish to call Mr. Batchelor?

Mr. George C. Finn: Yes, your Honor.

The Court: Mr. Batchelor, will you take the stand, please? [13]

GEORGE BATCHELOR

called as a witness by the defendants Finn, having been previously sworn, was recalled and testified further as follows:

Direct Examination

The Clerk: You have been sworn, Mr. Batchelor?

The Witness: Yes, sir, I have been sworn before.

The Clerk: Your name is——

The Witness: George Batchelor.

The Court: You may proceed, Mr. Finn.

Mr. George C. Finn: May I consider Mr. Batchelor qualified, as he was in this other——

The Court: Well, any testimony he has heretofore given is given in the case. Any question about his qualifications to express an opinion as to the value?

Mr. Abbott: No, your Honor.

The Court: As of what dates do you wish to establish value?

Mr. George C. Finn: I am establishing leasing.

The Court: Well, any value as of what date?

Mr. George C. Finn: In August, 1951.

The Court: Any other time? The way to do this is, out of an abundance of precaution, establish it on every date that might be material. Then you don't have the necessity of wishing you had. [14]

Mr. George C. Finn: Yes, your Honor, establish it as of August and establish it as of January.

(Testimony of George Batchelor.)

The Court: We cover the periods covered in the interrogatories the jury is now considering?

Mr. George C. Finn: Yes, sir.

The Court: You wish to speak of rental value, now?

Mr. George C. Finn: Yes.

The Court: Mr. Batchelor, was there a market for rental of these C-46 planes during the period from 1946 up through the time of the commencement of this suit on July 3, 1952, and up to date?

The Witness: Well, until the time of—the approximate time of the Korean War the planes had no rental value.

I would like to know in what condition I am to assume the airplane is in? [15]

The Court: When did you first see this airplane in suit?

The Witness: In the summer of 1950.

The Court: At that time, in the condition it was in then, was there a market rental value of that plane for any purpose?

The Witness: Well, in the condition it was in at the time we saw it, no work on it, I would say no. Now, I say “no.” I mean no substantial rental value.

The Court: Well, when did you next see it after that time in 1950?

The Witness: I saw it two times close together in 1950; and the same would be true for both of those instances.

The Court: When did you next see it?

(Testimony of George Batchelor.)

The Witness: I next saw it in October, 1951.

The Court: Now, at that time when you first saw it in October, 1951, did it have, or was there any market value for the rental of it in the condition in which it was at that time?

Let's get at it this way: Your company did work on it in that month, did it not?

The Witness: Started then, yes, sir.

The Court: All right. At the time you started work on it was it in a condition that it had any market value for rental? [16]

The Witness: Very nominal amount.

The Court: What do you mean by "nominal"?

The Witness: Very small amount, in my opinion.

The Court: You may be talking about thousands and I am thinking of pennies. What is "nominal amount" to you?

The Witness: Well, as an unlicensed airplane it would have no value.

The Court: There was the plane for any use you could put it. Did it have any market value, the use of that plane, for any purpose in the condition in which it was? Did it have any market value—that is the question—for any purpose? And, assuming there were no restrictions upon you, other than those imposed by law; and by that, it cannot fly without a permit, license——

The Witness: Well, I would say assuming for any purpose, there was a rental value.

The Court: Do you have an opinion as to what that rental value was?

(Testimony of George Batchelor.)

The Witness: As an unlicensed airplane? No, sir.

The Court: Well, whatever it was.

The Witness: It was unlicensed at that particular time. You said as it——

The Court: Could someone take it and get a license and use it for something?

The Witness: Yes, sir. [17]

The Court: Now, your company did work on it when?

The Witness: During the latter part of 1951; October, '51, through April, '52.

The Court: When is it first contended that the defendants Finn were deprived of the use of it?

Mr. George C. Finn: Deprived of the use of it on September 18, 1952.

The Court: Are you familiar with the condition of the plane at that time?

The Witness: I am familiar with its condition at the time it left International's hangar.

The Court: When was that?

The Witness: That was in May of '52.

The Court: All right. In the condition in which it was then did it have any market value for rental purposes, the use of it; for any purpose, any lawful purpose?

The Witness: Well, I am a little confused, your Honor. To take—it would have a rental value, to take the airplane such as International was willing to do and to spend money and license it, then it would have a rental——

(Testimony of George Batchelor.)

The Court: Mr. Batchelor, there is the plane setting over there. It is in the condition it was then, whatever that was. I am asking you what it was; whatever it was. And here's a man who owns it. He says he won't sell it but he will rent it to you. He says, "I won't ask you what you are going to [18] use it for. Use it for anything you want to use it just so it isn't contrary to law."

What was it worth to the man who wanted to rent it, no matter for what purpose he wanted to rent it? Perhaps he wanted to rent it and paint it a different color and put something on it and use it for the sideshow; whatever he might want to rent it for.

He might want to rent it and overhaul it and put it in as a plane on a passenger line. He might want to haul freight with it. He might want to dust crops with it. I don't know; whatever it was usable for. What he is buying is the right to use that plane. Did it have a market value for the use of that plane?

The Witness: Yes, sir.

The Court: Do you have an opinion as to that value?

The Witness: Yes, sir.

The Court: What is your opinion?

The Witness: In the winter of 1951, and through and in 1952, it would have been worth—the value would be \$5,000 a month, after it was licensed.

The Court: No. It isn't licensed. It is standing over there. I don't know whether it is licensed or

(Testimony of George Batchelor.)

not. Was it licensed at the time it left your hangar?

The Witness: No, sir.

Mr. George C. Finn: May I point out one example, Mr. [19] Batchelor?

The Court: Just a minute. We want the dates.

Mr. George C. Finn: You know San Diego Sky Freight——

The Court: You aren't permitted to coach your witness. We want the date. What is the date you are inquiring about?

Mr. George C. Finn: I am inquiring as to the date of September 18, 1952.

The Court: Was it in the same condition when it left the hangar?

Mr. George C. Finn: Yes.

The Court: Let's take the condition the witness knows.

Mr. George C. Finn: Except it was flying better.

The Court: What date did it leave the hangar?

Mr. George C. Finn: May 25, 1952.

The Court: Do you agree on that day?

The Witness: That would be approximately correct. I don't know the exact day.

The Court: Do you know the condition it was in?

The Witness: Yes, sir.

The Court: Suppose you had leased it that day. That is what we are talking about. You might have to do a dozen things. You might have to put new tires on. You might have to import a partner from South America. But that is no concern to the man

(Testimony of George Batchelor.)

who is leasing the plane. That doesn't affect the market price. Here is a plane available for rental for whatever [20] you can adapt it for. As I say, you might make a sideshow out of it. I don't know. Whatever it is usable for. That plane, in the condition it was in, did it have a market value?

The Witness: Yes, sir.

The Court: Do you have an opinion as to the value?

The Witness: In that condition and that date I would say \$2,000 to \$3,000 a month.

The Court: You wouldn't make a deal on that basis, you see, because the man would immediately want to know which it is, two or three.

The Witness: We would have leased it for two on that date.

The Court: That isn't the test. The test is what a seller—that is, a lessor or renter, the owner, not being compelled to rent but wishing to rent it in the open market, what he would be willing to rent it for; and what a lessee or a person who wanted to use it, but not being compelled to have it, would be willing, voluntarily, to pay for it at that time: say by the week or by the month, whatever the custom is in the trade.

The Witness: The custom is by the month. Well, I would say \$2,500 a month.

The Court: Would be the fair cash rental value?

The Witness: Rental value, both ways.

The Court: The plane, the condition it was in at the [21] end of May, 1952, until what time? In

(Testimony of George Batchelor.)

other words, when would that rental value change in the future?

The Witness: Well, it would have changed in the winter of 1953.

The Court: It would be \$2,500 a month from the end of May, 1952, through to the winter of 1953?

The Witness: I would think so.

The Court: What would you call the winter of 1953?

The Witness: Well, until the middle of January, 1953.

The Court: January 15, 1953. What would it have been then?

The Witness: Decrease slightly to \$2,000 a month then.

The Court: Until what period?

The Witness: Until about the 1st of May.

The Court: Until May 1, 1953. Then what would it have been?

The Witness: Go up slightly again, I would say, to \$2,500 a month.

The Court: Until what period?

The Witness: Well, in the summer months the values are higher than they are in the winter months, when traveling is slow.

The Court: From May 1st until what?

The Witness: Through—well——

The Court: When are the summer months over in the aviation [22] industry?

The Witness: Well, heavy traffic in the summer falls off around the end of September. But then it

(Testimony of George Batchelor.)

picks up again about the middle of November until after the Christmas holidays.

The Court: All right. You are renting this plane. You are telling us the fair market value. We have it at \$2,500 per month from the end of May, 1952, until mid-January, '53; \$2,000 a month until May 1, 1953; and then up to \$2,500 a month May 1, 1953, until——

The Witness: Well, in 1953, I'd say in September, September 15th, the value would have fallen that way.

The Court: Until when? To what figure?

The Witness: To around \$2,000 a month again, I would say, right through to today.

The Court: That is, today?

The Witness: Now, I am having to assume something here.

The Court: What are you assuming?

The Witness: Well, I am assuming that the leasing party is having to spend its own money and taking that into consideration to license the airplane and place it into service.

The Court: He takes it as his?

The Witness: Yes, sir, I am assuming that. And that he is spending his own money to license the airplane, put it in service, and maintain it.

The Court: Yes. The owner of the plane isn't doing [23] anything except collecting the rent.

The Witness: That is correct.

The Court: You are assuming——

The Witness: Yes, sir.

(Testimony of George Batchelor.)

The Court: ———that the lessee of the plane or the renter takes it as his own and bears all expenses.

The Witness: Yes, sir.

The Court: Now, do you wish to cross-examine on this point?

Mr. George C. Finn: Your Honor, may I ask one more question on this point, on the rental?

The Court: Yes.

Mr. George C. Finn: Would it make any difference if that same airplane were used in Mexico; between, for instance, Baja California and San Diego? Would that make any difference as to the rental value, since there would be no certification required? Would that change the rental value?

The Witness: That would possibly increase it slightly.

The Court: Mr. Batchelor was asked to assume that the renter, the lessee would put it to any use he pleased. And presumably, he would put it to what he thought would be the highest and best use; most advantageous.

The Witness: Yes, sir.

Mr. George C. Finn: That may include whatever he could do in this country, and there are different considerations. [24]

The Court: Mr. Batchelor was assuming, I take it, rather, all practicable uses.

Mr. George C. Finn: I think he may have forgotten the possibility it could have operated uncertificated elsewhere.

(Testimony of George Batchelor.)

What would the increase in value be if it was operated elsewhere?

The Witness: Slightly increased risk involved, so the rental would be increased slightly—I would say approximately \$500 a month during each of the periods that I have mentioned. But you do have a greater risk involved.

The Court: Would you pay for the plane? That is the question. Would the man who is going to take that risk, would he pay that much more for the plane? Would the owner rent it for that purpose?

The Witness: They would have to pay more to fly it into Mexico because most companies in the States are reluctant to allow a plane to operate into Mexico.

The Court: That is because of insurance problems?

The Witness: No, sir, not insurance. It's other problems.

The Court: Operational problems?

The Witness: Yes, sir.

The Court: Well, we are dealing with two people who are bargaining over the rental of this plane, and they are here in Los Angeles, or in Los Angeles County—the scene of these transactions is Los Angeles County and Kern County—they [25] are bargaining over it, and the fair market value for cash of the rental of this plane is what this theoretical owner and this theoretical lessee would arrive at as a fair bargain. That is what you are considering, isn't it?

(Testimony of George Batchelor.)

The Witness: Yes, sir.

The Court: With the right to the lessee to use it for any lawful purpose.

The Witness: That is correct.

The Court: Anything further?

Mr. Charles C. Finn: One question.

Q. (By Mr. Charles C. Finn): Isn't it true, Mr. Batchelor, that a person desiring to lease an airplane of this type, in his willingness to rent the plane, is also willing to put the airplane into shape and is willing to make a lease of a considerable amount of money, realizing he has to first put in an investment of maybe \$45,000 or \$55,000, willing to invest that money and then fly that airplane out, fly his investment out at a certain rate per month and then pay to the lessor the cash value when that bill of rehabilitation has been paid? Is that ever done? A. Yes, sir, that is done.

Q. Is that common practice?

A. Well, it is not the most common, but it is done quite often.

Q. Reasonable to expect—— [26]

A. Reasonable in normal business.

Q. Did you ever do that?

A. We have done the work and worked it out on the basis we were to be paid after the airplane was flying.

Q. Did you make such an agreement with the Finns to do that? Did International make such an agreement to the Finns, to your knowledge?

A. Yes.

(Testimony of George Batchelor.)

Q. And it was, substantially, that International would rehabilitate the airplane, would lease it for a certain amount, would fly the airplane, pay off the investment of International by the use of the plane for a certain number of months and then pay cash to the lessors for the remainder of the time?

Mr. Abbott: The lease instrument which Mr. Finn refers to is in evidence and speaks for itself. That, I believe, is International's Exhibit G.

Mr. George C. Finn: Your Honor, I think this is essentially covered, unless there is some business sense that I don't understand about it here in the way Mr. Batchelor presented it. He said——

The Court: Well, if you think it is covered——

Mr. George C. Finn: What is your question?

Mr. Charles C. Finn: I just want to know how much did you engage—lease this airplane for under those circumstances per month and for what period of time? [27]

The Witness: Mr. Finn, I was asked to assume that this lease was as appeared starting in May, 1952, which was nine months after the period of the prior arrangement with you and your brother.

Mr. Charles C. Finn: Would it be improper to refer my question to that time, at the time of the lease of International?

The Court: The lease is in evidence and I assume it shows the amount.

Mr. George C. Finn: It shows \$5,000.

The Court: Very well. It speaks for itself, doesn't it?

(Testimony of George Batchelor.)

Mr. George C. Finn: Yes.

The Court: When you say "so much per month," did you assume that the lease was on a month-to-month basis, the lease of the plane?

The Witness: The lease would be on a month-to-month basis.

The Court: Anything further on direct examination?

Mr. George C. Finn: And unlimited in flying hours?

The Witness: Yes.

Mr. George C. Finn: Are airplanes ever leased on a basis of flying hours, so much per hour?

The Witness: Yes, sir.

Mr. George C. Finn: What is the normal rental value on [28] an hourly basis?

The Witness: Well, there again——

Mr. Abbott: We object to the form of the question, unless Mr. Finn indicates he is referring to licensed or unlicensed aircraft.

The Court: You would have to limit it to this aircraft and specify the period. And I assume that is covered in the question that Mr. Batchelor has already answered. He has covered a transaction which would permit the highest and/or most advantageous financial use of the plane by the lessee permitted by law.

Mr. George C. Finn: Yes, your Honor. Now, there are two systems in the industry, a flat monthly rate to fly out as long as you want, and then there is another lease where the time is prorated.

(Testimony of George Batchelor.)

The Court: Well, under the questions I put he might not even fly the plane at all. He might locate it on the carnival grounds and use it as a side-show——

Mr. George C. Finn: Well, take this as a basis——

The Court: ——whatever would bring the user the most profit. And he would be the judge of that.

Mr. George C. Finn: Yes, your Honor.

The Court: He would be entitled to use it for any lawful purpose, day or night. That is what you assumed?

The Witness: Yes. [29]

The Court: Are you willing to turn the witness over to cross-examination on this question?

Mr. George C. Finn: Yes, your Honor.

The Court: On this issue.

Cross-Examination

By Mr. Abbott:

Q. When you answered the question of the court in which the court referred to "month-to-month leasing," Mr. Batchelor, did you have in mind an arrangement by which at the end of any particular month the lessor might demand return of the aircraft to him?

A. No. I predicated the values on the assumption that the lease would be for approximately one year.

Q. Then if the leasing period differed from more than one year, so would your values, I take it.

(Testimony of George Batchelor.)

A. Yes, sir.

Q. What was the approximate cost of doing the work necessary to licensing the aircraft in question for commercial use in the United States as of May 25, 1952?

A. On this airplane?

Q. Yes, sir.

A. Well, may I ask you a question? For passenger operations in the United States in May of 1952, is that right?

Q. Well, perhaps I can clear it up this way: The C-46A has never been considered an aircraft suitable for [30] freight use, has it?

A. Well, it is anywhere except in the United States.

Q. And the reason why it is not suitable for freight use in the United States is because there is a limit on the gross pay load?

A. Yes, sir.

Q. And that limit is how much?

A. 45,300 pounds at the present time, against 48,000 on the other models, or the later models.

Q. And that limit is one which makes it commercially unfeasible to use the aircraft for hauling freight?

A. In the United States, yes, sir.

Q. Now, is that limit one which has been imposed upon the use of the aircraft by the C.A.A. for reasons of safety?

A. No.

Mr. Blackman: Just a moment. Your Honor, the question as it now stands calls for a conclusion with respect to the reasons why the C.A.A. may have imposed limitations. I think if the last part of the

(Testimony of George Batchelor.)

question is eliminated there wouldn't be any question.

Mr. Abbott: May I inquire what Mr. Blackman's role is in this proceeding?

Mr. Blackman: This is my client on the stand.

The Court: He is a party to this action; and he will be amicus curiae, if necessary. [31]

Mr. Blackman: Thank you, your Honor.

Q. (By Mr. Abbott): Are you familiar with the tests made by the Civil Aeronautics Administration in fixing specifications for commercial aircraft?

A. I know such tests are conducted.

Q. Are you familiar with them? Have you observed such tests being made?

A. I have observed parts of them being made.

Q. And are tests made with respect to gross payload to ascertain the safe limits which may be imposed for cargo carrying?

A. Well, that's a very difficult question, Mr. Abbott. The gross load—a gross weight take-off, weight of an aircraft, is an over-all safety feature for any form of operation.

Q. Now, how much work, in terms of dollars, was necessary to license the aircraft in question for use as a cargo carrying aircraft within the continental limits of the United States on May 25, 1952?

A. Well, it could have been accomplished for as low as \$24,000, \$25,000; and then, depending upon the amount of radios and other factors, up to a maximum, or up to around \$35,000.

(Testimony of George Batchelor.)

Q. What is the approximate cost of doing the work necessary to licensing the aircraft in question for use [32] within the continental limits of the United States for the carrying of passengers as of May 25, 1952?

A. Well, license day-night instrument for passenger carrying for hire, I'd say \$45,000 total would be a fair figure. Now, that is not in addition to licensing it for freight. That is the total cost starting from zero.

Q. Would those two figures to which you testified in your last two answers vary during the period from May 25, 1952, to the present time?

A. Yes, sir. I think they would increase slightly due to labor and material becoming more expensive.

Q. Calling your attention to September 18, 1952, as of that date would there be a difference in either figure?

A. I don't think any appreciable difference.

Q. Would either figure be different?

A. You mean between May and September of '52?

Q. Yes.

A. I don't think any appreciable difference.

Q. Would either of those figures to which you have testified as to cost of certification vary between September of 1952 and February 1, 1953?

A. Well, if I may answer you this way: There has been a slow, gradual increase in labor, and there has been an increase in the cost of parts up until, I'd say, the summer of this year. In the sum-

(Testimony of George Batchelor.)

mer of this year the cost of [33] C-46 parts has decreased.

The Court: Those are replacement parts?

The Witness: Yes, sir.

Q. (By Mr. Abbott): What is your opinion of the cost of doing the work necessary to certify the aircraft for flight for passenger purposes within the continental United States on February 1, 1953?

A. I'd say—there again, I have to assume you mean day-night instrument; the same condition as before. I would say an increase of a thousand to \$1,500, making \$46,000 to \$46,500.

Q. And what would be the approximate cost of doing the work necessary to certification for freight use within the continental United States as of February 1, 1953?

A. Well, it's easy to just say "freight use," without going into a complete list of specifications. So I have to keep sitting here making assumptions that you are not asking me about. I hope you appreciate that.

Q. Well, assume that the work being done for certification, to the extent there is option in the owner, is the work which a reasonable, prudent aircraft owner would make in order to best enhance the chattel?

A. Well, I'd say \$27,500 would be a fair figure. That's for just freight.

Q. Why is that figure lower than the maximum figure [34] of \$35,000 that you fixed for the same work as of May 25, 1952?

(Testimony of George Batchelor.)

A. Because you have now asked me to assume that I am a prudent aircraft owner and trying to get the work I can done for the least amount of money.

Q. Are you also assuming that the work is being done by competent technical people and at the fair market value for the work so done?

A. Yes, sir. And I stated before it could have been done as low as around \$24,000, I believe.

Q. On what date after February 1, 1953, was there a change of significance in the cost of certification for use within the continental United States?

The Court: I don't know what the purpose of this is, Mr. Abbott, but it isn't helping me. It may help the Court of Appeals, but it doesn't help me.

Mr. Abbott: The purpose is this, your Honor: In order for any person to fly, the lessee or lessor, this work must be done.

The Court: Yes, but you have given me an idea of what it is. I don't care about the details.

Mr. Abbott: Perhaps one question will clear it up.

Q. (By Mr. Abbott): Was there any significant change in the cost of doing the work of certification necessary to certification from February 1, 1953, to the present time? [35]

A. Well, if I——

The Court: Any substantial—anything that would affect the rental value or the market value, I take it. Is that what you mean, Mr. Abbott?

(Testimony of George Batchelor.)

Mr. Abbott: It is, your Honor.

The Witness: Well, now, you are asking me the cost of licensing, is that correct, certification of the aircraft; not the rental value?

The Court: Doing the work necessary, essential to certification. Is that it?

Mr. Abbott: That is it, your Honor.

The Witness: Not anything appreciable; no big increase.

Q. (By Mr. Abbott): Have you ever known of a leasing of an unlicensed aircraft, an aircraft which could not be licensed without a minimum expenditure of \$24,000? A. Yes, sir.

Mr. George C. Finn: I object. This doesn't have anything to do with reasonable rental value.

The Court: He is testing the witness' experience. Overruled.

Your answer is yes?

The Witness: Yes, sir.

Q. (By Mr. Abbott): What is the incident to which you refer, or the transaction to which you refer?

A. There is a company in San Diego flying [36] into Mexico, Lower, California, flying freight, that are flying unlicensed aircraft; and they have leased them.

Q. Was the aircraft in question in condition satisfactory for the flying of freight between Mexico and San Diego, California, on May 25, 1952?

A. That I don't know.

Q. Isn't it a fact, sir, that a substantial part of

(Testimony of George Batchelor.)

the work that was then necessary to certification of the aircraft would also have been necessary if the aircraft were to be used at any place in the world for commercial purposes? A. No.

Q. Did the aircraft have all of its instruments on May 25, 1952?

A. Well, instruments are one of the smaller cost items in an airplane, anyway. They are not a substantial item.

Q. Did it have all the instruments on that date?

A. The aircraft in suit?

Q. Yes, sir.

A. May 25th. Well, I can't answer that. I don't know.

Q. Were you familiar with the condition of the aircraft on May 25, 1952?

A. Well, yes, sir; I was familiar with the aircraft.

Q. Were you familiar with its condition on [37] that date?

Mr. George C. Finn: I object.

The Court: Let's don't go into all this, Mr. Abbott. You ask him if he went out and counted all the instruments. He says he didn't. He can still be familiar with the condition of the airplane and still not know whether it had every possible instrument at that time. I am interested in saving time. That is all.

Mr. Abbott: I am not splitting hairs, your Honor——

The Court: Well, if you think it is worth it.

(Testimony of George Batchelor.)

Q. (By Mr. Abbott): Did it have substantially all of its instruments on that date, May 25, 1952, Mr. Batchelor? A. Well, I can't——

The Court: Just answer the best you can. You don't know or you do.

The Witness: I don't remember.

Q. (By Mr. Abbott): Did it have any seats for passenger use? A. No, sir.

Q. Did it have the lavatories necessary for passenger use? A. No, sir.

Q. Did it have the stewardess' or steward's compartment necessary——

The Court: You asked him what it would cost to put it [38] in condition, haven't you?

Mr. Abbott: Your Honor, the contention is made that this aircraft may have been useful in its condition outside the United States.

The Court: I am not interested in that. You have been asking what it would cost to put it in condition, haven't you?

Mr. Abbott: To fly within the continental United States, your Honor.

The Court: Fly any way.

Mr. Abbott: If that is the gist of the testimony I will rest. As I understood the questions and answers that work was necessary to flying it within the United States. The point we would make is a substantial part of it is necessary to fly any way.

The Court: Why not ask him what it would cost to put it in—I don't want an itemization.

Q. (By Mr. Abbott): What would it cost, Mr.

(Testimony of George Batchelor.)

Batchelor, on September 18, 1952, to put the aircraft in question in condition to be used outside the continental United States for passenger use?

Mr. George C. Finn: Your Honor, that is assuming that it——

The Court: Please don't interrupt unless you have something important. Let's get on with this. I am trying [39] to help you try your case.

The Witness: Well, there again, without a definite list of specifications, Mr. Abbott, I can't give you—if you will tell me——

Q. (By Mr. Abbott): Assume whatever work a prudent aircraft operator would do in order to fit the aircraft for the purpose described.

A. Well, with bucket seats——

The Court: Don't itemize it. You say what you think it would be.

The Witness: I'd say \$12,000 would have put it into service as a passenger-carrying aircraft outside the United States.

Q. (By Mr. Abbott): And that would be with minimum facilities of comfort for the passengers?

A. Yes, sir.

Q. What would be the cost of fitting the aircraft for commercial use, freight hauls, outside the continental United States after September 18, 1952?

A. Approximately \$8,000 or \$9,000.

Q. Would either of the last two figures to which you testified change materially from September 18, 1952, to the present time?

(Testimony of George Batchelor.)

A. As I have already said, the cost of all labor went up to the present time, and parts went up until the [40] spring of this year.

Q. On approximately a straight line basis? Do you know what I mean by that?

A. Be a slow, gradual increase.

Q. What has been the approximate percentage increase in that period?

A. Well, without calling a bookkeeper and asking exactly what it was, I'd say an average of maybe 10 to 15 cents per man-hour cost.

The Court: How much would it affect these figures that you have been giving us?

The Witness: Not over a maximum of 10 per cent.

The Court: Would it be approximately 10 per cent?

The Witness: Well, without—I am just guessing on it. I know the cost has been going up.

The Court: Then it would be approximately 10 per cent, Mr. Batchelor?

The Witness: I'll say five to 10 per cent.

Q. (By Mr. Abbott): Seven and a half per cent would be the approximate figure?

The Court: He said approximately five to 10 per cent. Isn't that sufficient?

Q. (By Mr. Abbott): Mr. Batchelor, have you ever known of the rental of an unlicensed C-46A for use within the continental United States? [41]

The Court: If you don't remember, just say so.

The Witness: I have heard of one.

(Testimony of George Batchelor.)

The Court: You don't know about it yourself?

The Witness: I don't know any of the details.

Mr. Abbott: Nothing further.

The Court: You have given us the closest approximation you can to these percentages and these figures?

The Witness: Yes, I have.

Mr. Abbott: No further questions, your Honor.

The Court: Anything further of Mr. Batchelor?

Now, Mr. Finn, if you want to include anything that you think is omitted now is your chance.

Mr. Charles C. Finn: We are through with the witness, your Honor.

The Court: What about his opinion as to value? Do you wish to ask his opinion as to market value? We have only covered rental value.

Mr. Charles C. Finn: I want to present to the court what we have, and I will just give what we are going to do. I want to submit the document in evidence with short explanation——

The Court: Let's finish with this witness, first. Do you want his opinion as to value? We want to make the best use we can of Mr. Batchelor while we have him here.

Mr. George C. Finn: I have affidavits, and I will ask—— [42]

The Court: What dates do you wish, the same dates that are included in the interrogatories, as to fair market value?

Mr. George C. Finn: As to fair market value, September 18th on.

(Testimony of George Batchelor.)

The Court: Mr. Batchelor, I ask you to assume—September 18th of what year?

Mr. George C. Finn: 1952.

The Court: Are you familiar with the condition of this plane on September 15, 1952?

The Witness: Yes. Well, as of the time it left our hangar.

The Court: At the end of May, 1952?

The Witness: Yes, sir.

The Court: I shall ask you to assume it was in the same condition on September 15, 1952. Did it have a fair market value in that condition at that time for cash?

The Witness: Yes, sir. Well, still assuming no restrictions.

The Court: Assuming that it could be used. I should have included that. We are really not being very fair with you in putting these questions.

Assuming that it is free of any restrictions as to sale or use, except those imposed by law.

The Witness: Yes, sir.

The Court: And what is your opinion as to what was the [43] fair market value on September 15, 1952, so assuming?

The Witness: I would say \$30,000, approximately; including the work we had done on the airplane.

The Court: We aren't interested in who did the work. Here is a buyer. This is a hypothetical buyer and he walks up, and he has never seen the plane before. He wants to buy it. He doesn't have to buy

(Testimony of George Batchelor.)

it. He wants to buy, but isn't forced to buy. And here is the hypothetical seller who owns the plane, free of all restrictions, ready to sell it on the open market for the highest and best price he can get. And they get together and they bargain and arrive at the fair cash market value. What is that figure, in your opinion? They don't know anything about all this lawsuit; no such thing; don't know anything about International or don't know anything about International repairing it.

The Witness: Sometimes it is difficult to put that out of my mind.

The Court: I understand. But you are qualifying as an expert here and we are asking you to assume this hypothetical seller and this hypothetical buyer. And they meet in this hypothetical market place here in Los Angeles—in Kern County. What figure would they arrive at as the fair cash market value of the plane; the buyer trying to buy it as cheaply as he could and the seller trying to get as much as he could? [44]

The Witness: I'd say \$30,000 to \$35,000.

The Court: He wouldn't sell it at that, because——

The Witness: The exact figure of \$33,000, I think, would be fair, in my opinion.

The Court: That would be your opinion, \$33,000. What other dates do we want to cover? On up to date?

Mr. George C. Finn: On up to date, your Honor.

(Testimony of George Batchelor.)

The Court: In your opinion would that figure change from September 15, 1952, up to date?

The Witness: It wouldn't have changed up to the early part of this year. And the early part of this year it would start to decrease.

The Court: It would be the same \$33,000 to what part of this year?

The Witness: January, February of this year.

The Court: Which was it?

The Witness: Well——

The Court: You will have to be a little bit arbitrary there.

The Witness: I'll say January 15th.

The Court: January 15, 1954. What would the value then be? Go down to so much.

The Witness: Well, we are still assuming the airplane is in the same condition?

The Court: Still assuming the same condition—9-15-52. [45] So I will have it clear, what is the significance of the date here, September 15, 1952? What happened on that day?

Mr. George C. Finn: That is the day the Government allegedly seized the airplane. Up until that time we have no complaint with the Government.

The Court: Very well. You are assuming that on September 15, 1952—you have assumed it was in the same condition as when it left your place of business at the end of May, 1952?

The Witness: Yes, sir.

The Court: All right. Now, you assume that same condition.

(Testimony of George Batchelor.)

The Witness: All right.

The Court: We want the market value, any changes, from September 15, 1952, when you said it was \$33,000, up to the present time.

The Witness: Well, in January of this year I would estimate the value to be \$28,000.

The Court: That is January 15, 1954?

The Witness: Yes, sir.

The Court: It went down to \$28,000. Has it changed since then?

The Witness: Right today I would estimate it as \$22,000.

The Court: Today at \$22,000. Would that be a gradual [46] decline, or——

The Witness: Yes, sir.

The Court: Anything further on direct examination?

Mr. George C. Finn: No, your Honor.

The Court: Cross-examination?

Cross-Examination

By Mr. Abbott:

Q. What condition of the aircraft are you assuming to exist today, Mr. Batchelor?

A. Well, the work that was performed by International.

The Court: He has been asked to assume it is in the same condition it was when it left International's shop at the end of May, 1952.

The Witness: Then I will have to correct that,

(Testimony of George Batchelor.)

because I am still figuring some deterioration on the airplane. The values would be slightly higher if it was in the same condition now as it was at the time it was taken out——

The Court: You have given us \$33,000 for the time it was taken out of your hangar, is that correct?

The Witness: Yes, sir.

The Court: And you have given that to us as September 15, 1952. You have given us \$28,000 as of January 15, 1954; and today \$22,000.

The Witness: I would say \$30,000.

The Court: January 15th, 1954, \$30,000. And what today? [47]

The Witness: Assuming it is in the same condition as it was then, \$25,000.

The Court: Very well. You may cross-examine.

Q. (By Mr. Abbott): Are you familiar with other recent purchases or sales of C-46As, Mr. Batchelor? A. Yes, sir.

Q. And are you familiar with offers to sell and offers to purchase C-46As within recent months?

A. Yes.

Q. Are you familiar with a group of unlicensed C-46As now owned by Civil Air Transport Company, Inc., which are presently hangared in Glendale, California, and which have been placed on the market?

A. I know the airplanes, and I have looked at them.

Q. Are those licensed or unlicensed aircraft?

(Testimony of George Batchelor.)

A. They are unlicensed.

Q. Do you know what the offering price is?

A. Not as of today I don't.

Q. Do you know it as of some other date?

A. I heard recently they were offering them at \$25,000.

Q. Wasn't that figure of \$25,000 a figure on certain unassembled C-46s in the group, Mr. Batchelor?

A. Well, they had the wings off. They are setting on their landing gear. [48]

Q. Aren't there also in the same group of aircraft in the possession of the Civil Air Transport, Inc., at Glendale some completely assembled C-46As which are not licensed?

A. Well, I tried to call the man last week that is handling that——

The Court: Just say if you know.

The Witness: No, I don't.

Q. (By Mr. Abbott): You don't know whether there were any complete aircraft on the field and in that group?

A. Yes, sir. The ones I looked at had the wings off of them. I saw them last Sunday.

Q. What addition to fair market value would result from the complete assembly of the aircraft which you saw at Glendale, owned by Civil Air Transport, Inc.?

The Court: Let's don't go into those. We have enough trouble finding the aircraft in suit. You are just giving those for example——

(Testimony of George Batchelor.)

Mr. Abbott: I only wanted to establish comparability.

The Court: Establish comparability. Ask him to establish comparability with the plane in suit, not with something else.

Q. (By Mr. Abbott): Can you compare the aircraft which you saw at Glendale, California, owned by Civil Air Transport, Inc., with the aircraft in suit in the condition [49] in which you last observed it to be? A. Well, that's difficult to do.

The Court: Then you can't?

The Witness: No, sir.

Q. (By Mr. Abbott): Are you familiar with a C-46A airplane recently sold in a partially dismantled condition at San Luis Obispo to Harry McCandlay and Ben Wedfield? A. Yes, sir.

Q. And are you familiar with an offer to purchase said airplane in assembled condition by one Jim Welsh?

A. Well, I doubt very much if Jim Welsh offered to purchase the airplane.

The Court: Then you are not familiar?

The Witness: No, sir.

Mr. Abbott: No further questions, your Honor.

The Court: Anything further?

Mr. Charles C. Finn: Nothing further, your Honor.

The Court: Do you wish to offer any testimony on this excessive depreciation which you say occurred?

Mr. Charles C. Finn: I think that we had agreed

(Testimony of George Batchelor.)

that the airplane would be returned in the same condition in which it was taken. That would have eliminated any discussion.

The Court: If the Government elects to return the plane, will the Government return the plane in the same good [50] order and condition it received it, ordinary wear and tear excepted?

Mr. Abbott: At the point where the Government took possession, yes, sir.

The Court: It it's returned to the defendants Finn it will be returned to them. If it is returned to the Vineland School District it will be returned there. If it is returned to the International Airports it will be returned there. If the Government is ordered either to return or deliver the plane or its value to one or more of the defendants, I take it that the delivery will be wherever the judgment orders. It will be an election; if the Government has that election. Of course, the defendants Finn are asking that the Government be decreed not to have the election because of the uniqueness of the plane, but be decreed the specific return of the precise aircraft.

Mr. Abbott: Well, I don't mean to quibble on this question of point of return, but it makes a difference for this reason: The point where the Government last retook possession was in Nevada, a short distance from Nellis Air Force, where it is being stored; a flight over a level desert area.

Mr. Charles C. Finn: We will accept that, your Honor.

(Testimony of George Batchelor.)

Mr. Abbott: Whereas to return the aircraft to this vicinity would be to put it in a better condition than it [51] was at the time the Government took possession at Scotty's airstrip. At that time it was not able to fly the mountains.

Mr. George C. Finn: I testify it did fly the mountains.

The Court: Please don't——

Mr. Charles C. Finn: We will stipulate to Scotty's air base.

Mr. George C. Finn: If they give it back to us we don't care where they put it.

Mr. Charles C. Finn: It must be in the same condition which they got it.

The Court: Will the Government return the plane, if required, to Scotty's airstrip in the State of Nevada? Is that a well-defined airstrip?

Mr. George C. Finn: It is a little——

The Court: Is it a well-known place?

Mr. George C. Finn: An abandoned air field.

The Court: Identifiable on the maps?

Mr. George C. Finn: Yes, sir.

Mr. Charles C. Finn: The south leg of the Tona-pah range, about 17 miles below Scotty's castle.

The Court: Will the Government there return the plane if it is ordered to return it, or pay its value in the same order and condition in which the Government received it, ordinary wear and tear excepted?

Mr. Abbott: It will, your Honor. [52]

The Court: Then do you have any occasion to

(Testimony of George Batchelor.)

put on any evidence in view of that agreement by the Government?

Mr. Charles C. Finn: No, your Honor. We think the Government——

The Court: As to any extraordinary wear and tear?

Mr. Charles C. Finn: I don't think there is any extraordinary wear and tear to the extent it can't be adjusted right there at the base.

Mr. George C. Finn: I would like to say this: We happen to be reserves, and if it is all right with the Government we will go down and watch them do it.

The Court: Very well. Is there anything further?

Mr. Blackman: I would like to ask one question.

The Court: Very well.

Q. (By Mr. Blackman): Mr. Batchelor, assuming that the parts necessary for relicensing this airplane were available and that the airplane were in a spot where it could be relicensed, for example, hangar No. 2, Lockheed Aircraft, and assuming the licensing required was the best type of relicensing that you have discussed in your testimony—you have considered in your questioning by Mr. Abbott—do you have an opinion as to approximately how long it would take to relicense the airplane?

A. For passengers?

Q. For passengers. [53] A. 90 days.

Mr. Blackman: That is all.

The Court: Anything further, Mr. Abbott?

(Testimony of George Batchelor.)

Mr. Abbott: Nothing further, your Honor.

The Court: You may step down, Mr. Batchelor.

(Witness excused.)

The Court: Any further evidence by the defendants Finn on the counterclaim?

Mr. George C. Finn: Is there anything that we present for the uniqueness of this aircraft?

The Court: Well, you might if you feel so advised. From the evidence I have heard it is apparently not so unique. There seem to be several of them offered for sale.

Mr. George C. Finn: There aren't any like this.

The Court: How do you mean "like this"; none better or none worse?

Mr. George C. Finn: There may be some better and some worse. But there aren't any that will satisfy our requirement in respect to this particular airplane. We have put something in this plane that you don't get in a shop, and——

The Court: You mean that you couldn't put in another plane?

Mr. Charles C. Finn: Heart.

Mr. George C. Finn: That's right; sentimental value, symbolic value, purpose value. [54]

Mr. Charles C. Finn: All our future is tied up in it.

The Court: If someone came and put a market price in your hand, you could buy another plane.

Mr. Charles C. Finn: We wouldn't accept it. There is no value in money.

The Court: I wouldn't want you to go that far; even in open court.

Mr. George C. Finn: We haven't accepted it before.

The Court: If someone came and put the purchase price in your hand and you could buy one today, I don't suppose you would turn it down.

Mr. Charles C. Finn: Your Honor, we have turned it down. We have been offered, and knew the cash was available, \$34,000 profit, clear, bankable profit, and we turned that down—and we saw the money.

The Court: So you consider it unique because it has sentimental value?

Mr. George C. Finn: Yes, your Honor.

The Court: Will it be stipulated that counter-claimants Finn will be deemed to have been called, sworn and so testified as they have last stated?

Mr. Abbott: So stipulate, your Honor.

The Court: So it will be deemed that they have given that testimony upon their counterclaim?

Mr. Abbott: Yes, your Honor. [55]

The Court: Anything further?

Mr. Charles C. Finn: Is it possible to submit any statement of fact to the court at a later date that may help the court determining such a thing?

The Court: We have taken the facts now. You can argue the law later, but not the facts. You have just stated the facts as I understand you contend them to be, and the Government stipulated that you be deemed to have taken the stand and testified.

Mr. George C. Finn: I will state further that

this isn't just an ordinary airplane to us. We happen to be pilots and we consider this airplane as a captain would his ship. This is ours.

The Court: You are sentimentally attached to it.

Mr. George C. Finn: There are all kinds of reasons. I don't have to enumerate them, I am sure. If you want me to enumerate, I will.

The Court: Not the least of them, it has been through this lawsuit with you.

Mr. George C. Finn: The least of it is the lawsuit.

The Court: Does the stipulation previously made extend to these statements last made? They may be deemed part of the testimony of the counterclaimants Finn on their counterclaim?

Mr. Abbott: We so stipulate. [56]

The Court: Is that enough?

Mr. George C. Finn: The least of it is the lawsuit. I mean, we have taken this plane off a 1,200-foot strip. We have——

The Court: Your experiences with the plane have attached you to it sentimentally.

Mr. Charles C. Finn: It has a value far beyond any airplane like it, or even a better airplane.

The Court: The same as if it were a family treasure or an heirloom?

Mr. George C. Finn: It is both.

The Court: Very well. Have we finished this phase of it now?

Does the Government include the last statements within the stipulation of what the counterclaimants Finn will be deemed to have testified?

Mr. Abbott: Will the court indulge me to the extent of having the statement read?

The Court: It adds up to the fact that the counterclaimants contend because of their past associations with it and experiences with it, they have become sentimentally attached to it, the same as if it were a family treasure or an heirloom.

Mr. Abbott: We will stipulate they will so testify.

The Court: And it will be deemed they have so testified? [57]

Mr. Abbott: And be deemed they have so testified.

The Court: Very well. Anything further?

Mr. Charles C. Finn: As to the rental, we just wanted to submit to the court—the documents speak for themselves—that at the time of the alleged seizure in September of 1952 there were negotiations being made with the company in Seattle, leasing of the aircraft in substantially the same form as the lease with International, and that was interfered with by the seizure of the plane; and that the Civil Aeronautics Administration had passed wires back and forth. And there are wires and the lease, which we would like to submit to the court.

The Court: You are entitled, as alleged owners, to testify as to your opinion as to rental value and market value for sale of this plane, if you wish to testify; in view of Mr. Batchelor's testimony you may do so. I will tell you frankly that when experts are called on a subject I don't give much

weight to the testimony of owners. But you are entitled to testify if you wish to take the stand now and testify your opinion, as owners, of the fair market value for sale and for rent.

Mr. Charles C. Finn: We don't wish to testify to that, except we wish to submit that to us the airplane is invaluable.

Mr. George C. Finn: May we submit other evidence— [58] that is, affidavits to the value of the airplane, just into the files, the records?

The Court: If the Government doesn't object, you may. Have you shown this to Mr. Abbott?

Mr. Charles C. Finn: No.

The Court: We will take a recess, and I suggest you show them to Mr. Abbott and see what the situation is.

We will recess for five minutes.

(Short recess taken.)

The Court: What else do you have to offer on behalf of the counterclaim?

Mr. Charles C. Finn: Your Honor, I wanted to make a stipulation to put this in evidence, the lease of the aircraft in September, 1952, of this aircraft in dispute. And there is an agreement that goes with that which has already been submitted in evidence which pertains to the rehabilitation of the plane. It was marked for identification. I am sorry.

I wanted to submit these to the court to demonstrate the rental value in September, 1952, which is the time at which the Government allegedly seized the plane.

The Court: Hand them to the clerk and the clerk will present them to the court.

(Whereupon the documents were handed to the clerk.)

Mr. Abbott: We object to the offer of the document. [59] The document has not been executed. Mr. Finn advises me it was never executed. We object on the further ground, even if it were executed, that particular transaction relating to the subject aircraft in suit would not be material.

The Court: It is just an offer. Offers are not transactions.

Mr. Charles C. Finn: Yes, your Honor.

The Court: The objection is sustained.

Do you wish it marked for identification?

Mr. Charles C. Finn: Yes.

The Court: It will be marked as counterclaimants Finn Exhibit 1 for identification.

(The document referred to was marked Counterclaimants Finn Exhibit 1 for identification.)

The Court: Anything further?

Mr. George C. Finn: May we submit the insurance on the airplane was the value——

The Court: It wouldn't help me.

Anything further?

Mr. Charles C. Finn: We rest, your Honor.

The Court: Counterclaimants rest.

Mr. Abbott: Mr. Duly, take the stand, [60] please.

DOUGLAS DULY

called as a witness by the plaintiff, having been previously sworn, was recalled and testified further as follows:

The Clerk: You have heretofore been sworn, Mr. Duly?

The Witness: Yes, sir.

Direct Examination

By Mr. Abbott:

Q. Mr. Duly, do you have an opinion as to the fair market value of the aircraft in suit for cash in the condition which it in fact was on the 18th day of September, 1952?

The Court: The 18th day? I have the 15th day.

Mr. Abbott: That date was used. I think the precise date was September 18th. If it will improve the record, I will use the 15th.

The Court: Is it stipulated that the values given for any date in September, 1952, may be deemed the same?

Mr. Abbott: We so stipulate.

Mr. George C. Finn: We so stipulate.

The Court: Very well.

The Witness: The value this date would be \$30,000.

Q. (By Mr. Abbott): Do you have an opinion as to the fair market value of the aircraft in suit as of February 1, 1953, assuming the sale for cash in the condition in which the aircraft in fact was on that date? [61]

(Testimony of Douglas Duly.)

The Court: What is the significance of that date, may I ask?

Mr. Abbott: There has been some statement in the record, your Honor, to the effect that the Government did not have possession of the aircraft until February 1, 1953, rather than September 18, 1952.

The Court: The counterclaimants have asserted the Government took possession September 15, 1952.

Mr. George C. Finn: Yes, sir. We have no complaint from that time backwards. We have no claim from that time backwards against the Government.

Mr. Charles C. Finn: Is that the 15th or 18th now?

The Court: Well, 15th or 18th, which is it?

Mr. Charles C. Finn: It was the 18th.

The Court: May I interrupt, gentlemen, if there is no objection, and ask Mr. Batchelor if his opinions expressed as of the 15th of September, 1952, would apply to the 18th as well?

Mr. Batchelor: Yes.

The Court: Very well. Thank you. Now you may answer, Mr. Duly.

The Witness: February of 1953, \$33,000.

Q. (By Mr. Abbott): Do you have an opinion as to the fair market value of the aircraft in suit as of the present date for cash consideration and in the condition in which in [62] fact it is?

A. Yes, sir. \$35,000.

Q. What was the date of your last inspection of the aircraft in suit, Mr. Duly?

A. October 22, 1954.

(Testimony of Douglas Duly.)

Q. Have there been any changes in market conditions with respect to C-46A aircraft between September, 1952, and the present date?

A. An airplane in an unlicensed condition?

Q. Market conditions for the type of aircraft which this aircraft in suit in fact was?

A. The market is fairly stable for that type of airplane, unlicensed-type airplane.

Q. Has the market increased or decreased at all during the period last described in my last question?

A. It decreased the first of this year; and the last six months there is a gradual increase.

Q. Do you have an opinion as to the rental value of the aircraft in suit from September 18, 1952, to the present time?

A. In its present condition?

Q. In the condition in which it was, in fact was during that period, and for cash?

A. The airplane was not fit for flight use. It had rental use for possibly a movie prop, which would be very [63] meager—\$50 a month.

Q. Did it have any rental value whatsoever as a flyable aircraft during the described period?

A. No, sir.

Q. And are you assuming in answering that question the condition in which the aircraft in fact was during that period?

A. Yes, I am.

Mr. Abbott: No further questions.

The Court: Do you wish to offer anything on rental value?

(Testimony of Douglas Duly.)

Mr. Abbott: On rental value, your Honor? That is the point covered by the witness' testimony just concluded, that it could be used as a movie prop and had a rental value of \$50 a month; and no rental value in the industry as a flying aircraft. It has been previously testified, as to rental value, assuming it is a licensed aircraft——

The Court: What was that?

Mr. Abbott: \$5,000.

The Witness: I don't believe you asked me the rental value before, but I would substantiate that now. If the airplane was a licensed airplane?

Q. (By Mr. Abbott): Yes.

A. During that period \$5,000 was common rental.

Q. And are you referring to licensing for passenger [64] use or for cargo use?

A. Passenger use.

Q. The aircraft in suit when licensed for cargo hauling, only? A. No.

Q. What, in your opinion, would be the cost of licensing the aircraft for commercial passenger use within the continental United States during the period from September 17, 1952, to the present date, starting with the aircraft in the condition which it in fact was during that period?

A. For average passenger configuration, between \$40,000 and \$45,000.

Q. And what is your opinion as to the cost of licensing the aircraft in suit for use as a cargo-hauling aircraft within the continental United

(Testimony of Douglas Duly.)

States, assuming the condition in which the aircraft in fact was during the period from September 18, 1952, to the present day? A. \$23,500.

Q. What in your opinion is the reasonable cost of making the aircraft in suit suitable for passenger service outside of the continental United States, assuming the condition in which it in fact was during the period September 18, 1952, to the present date?

A. Bare minimum passenger use? Ordinarily that can be—stateside is de luxe interiors; outside the country [65] it can be lower than that.

Q. Just give us both figures, if you will, the de luxe interior and the minimum interior.

A. For use outside of the United States, interior for about \$18,000 plus \$10,000 preparation for the airplane, making a total of \$28,000 for de luxe interior.

Q. And minimum-type of interior for passenger use? A. Deduct \$6,000.

Q. Or \$22,000? A. \$22,000.

Q. Is the aircraft in suit one which can be feasibly used for cargo haul outside the continental United States? A. Yes.

Q. What is the cost of making the aircraft suitable for that purpose, assuming the condition in which it in fact was during the period from September 18, 1952, to the present date?

A. Approximately \$11,000.

Q. Did the aircraft have a fair rental value in the condition in which it in fact was during the

(Testimony of Douglas Duly.)

described period, if used outside the United States?

A. I have no knowledge of costs outside the United States for cargo use.

Q. You mean you have no knowledge of rental values outside the United States? [66]

A. Yes.

Mr. Abbott: No further questions.

The Court: Did you hear Mr. Batchelor's testimony, the opinions he expressed?

The Witness: Yes, I did.

The Court: Mr. Duly, may I ask you to assume—first, I would like to ask you, are you familiar with the condition in which this plane, in fact, this airplane in suit was in the month of September, 1952?

The Witness: Yes, your Honor.

The Court: I will ask you to assume it to be continually in that condition in which you knew it in fact to be from the month of September, 1952, to today; and I will ask you to assume it was owned by a person who wished to rent it but did not wish to sell it, but wished to rent it on a month-to-month basis, but was not compelled to. I wish you to assume a person who wished to lease it from him on a month-to-month basis but was not compelled to.

Do you have an opinion as to what would have been the fair market value for cash for the rental of that plane in the condition in which it was in the month of September, 1952, to be put to any lawful purpose for which the lessee wished to put it, assuming he'd put it, of course, to the purpose which

(Testimony of Douglas Duly.)

he thought would be the highest and best, most financially profitable use? [67]

The Witness: It would not be leased to anybody in its condition in those dates. The license must——

The Court: As I told——

The Witness: It cannot be leased.

The Court: As I told Mr. Batchelor, he might take it and make it into a menagerie; he might take it and make a freight hauler or air express out of it. I don't know what he would do with it. He is a man who wants to rent it, rent that plane on a month-to-month basis in the condition in which it was. And here is the owner who wants to rent it to him. They bargain upon a price and arrive at the fair market value for the use of that plane on a month-to-month basis. Do you have an opinion of the fair cash market value for rental purposes on a month-to-month basis in September, 1952, which would be arrived at by this hypothetical owner and this hypothetical renter, or lessee?

The Witness: The hypothetical lessee would not rent an airplane under that condition.

The Court: I ask you to assume that he would.

The Witness: I have no knowledge.

The Court: You have no opinion?

The Witness: No.

The Court: Very well. Anything further of Mr. Duly?

Mr. Charles C. Finn: Nothing further.

The Court: You may step down. [68]

Mr. Abbott: May I ask a question or two to

(Testimony of Douglas Duly.)

develop the matters covered by the court's last questions?

The Court: Yes. I thought you were finished.

Q. (By Mr. Abbott): What was the highest and best use of the aircraft in question in the condition in which it in fact existed from September 18, 1952, to the present date, Mr. Duly?

Do you understand what I mean by "highest and best use"? A. In its present——

Q. As it actually existed then?

A. It would not—it could be leased for non-flyable purposes, for ground use, for \$50 a month.

Q. Is that the highest and best use of that aircraft during the period described in my question as it in fact existed in that period?

A. To my knowledge, yes.

Mr. Abbott: No further questions.

Mr. George C. Finn: Your Honor, one question, please.

Mr. Duly, could the aircraft have been used for experimental purposes on any special licensing arrangement?

The Witness: It being a C-46A, no.

The Court: Anything further of Mr. Duly?

You may step down, Mr. Duly. You are excused.

(Witness excused.)

The Court: Any further evidence by the counter-defendant [69] United States of America?

Mr. Abbott: Nothing further, your Honor.

The Court: Any rebuttal?

Mr. Charles C. Finn: Nothing further, your Honor.

The Court: Both sides rest?

Mr. Abbott: We do, your Honor.

The Court: Very well.

Mr. Abbott: We have a motion we would address to the court in connection with the testimony just concluded.

The Court: Mr. Duly's testimony?

Mr. Abbott: All testimony relating to the counterclaim, your Honor.

We move that all of the evidence taken today in connection with the counterclaim be made a part of the record in the principal case and be a part of that record for all purposes.

The Court: I would assume it would be without the motion.

Mr. Nelson: We object strenuously to the inclusion of this testimony into the record. It has nothing to do with the principal case or the Government's case against the School District.

The Court: It wouldn't be considered except on the counterclaim.

Mr. Nelson: For those purposes we will accept the testimony. [70]

The Court: And I deem it as part of the record without the motion. I deem the motion unnecessary. I take it Mr. Abbott makes it out of an abundance of precaution.

Mr. Abbott: There is this purpose, your Honor: That the Government contended in the course of the principal trial that the aircraft had no reasonable

rental value, only negligible rental value at that time, at the time when the Government——

The Court: As far as putting it in in support of the complaint, the evidence in that matter is closed and now in the hands of the jury.

Mr. Abbott: But no issue of rental value was submitted to the jury, your Honor.

The Court: So the evidence here is part of the evidence in the case; yes.

Mr. Abbott: For all purposes?

The Court: Yes. For all purposes for which it is properly to be considered.

Anything further?

Mr. Nelson: Well, I don't quite understand the last statement. It cannot be put into the case from the standpoint of the Government's case against the school.

The Court: It cannot be put in there for the purpose of anything to the jury. It can't affect any of the issues submitted to the jury. I take it the purpose of it is to [71] buttress the record on the question of rental values.

Mr. Abbott: Yes, your Honor.

Mr. Nelson: We would so object to the testimony as against the School District then, your Honor, because we did not so understand. The testimony was only coming in as to the counterclaim.

The Court: You offered no evidence to the contrary in the trial. I don't understand he expressed any opinion he didn't express at the trial, in effect. He expressed a \$50 per month rental value for ground use; and during the course of the trial on

the main case, so-called, he said it didn't have any rental value, as I understand it. Is that correct? Is my recollection correct?

Mr. Abbott: I believe he said negligible.

The Court: In effect, none.

Mr. Nelson: I will also call the attention of the court that those dates were in 1952.

The Court: Why are you objecting? That is what I can't understand. If you will tell me——

Mr. Nelson: I didn't see why it could come into the principal case. Now the court has cleared up the point. I am satisfied.

The Court: Very well.

[Endorsed]: Filed May 19, 1955. [72]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages, numbered from 1 to 236, inclusive, contain the original Complaint; Amended Complaint; Answer of Defendant International Airports, Inc., to Amended Complaint; Order Denying Motion to Dismiss; Notice of Motion to Dismiss for Failure to State a Cause of Action; Minute Order of the Court dated January 19, 1953; Answer to Amended Complaint; Answer of Defendants Finn to Amended Complaint; Cross-Complaint, Charles C. Finn, Cross-

Complainant, United States of America, Cross-Defendant; Amendment to Cross-Complaint, Charles C. Finn, Cross-Complainant, United States of America, Cross-Defendant; Answer of Seaboard Surety Company; Motion to Dismiss Cross-Complaint; Minute Order of the Court dated August 26, 1954; Counterclaim; Cross-Complaint for Damages, Seaboard Surety Company, Cross-Complainants, George C. Finn and Charles C. Finn, Cross-Defendants; Minute Order of the Court dated October 11, 1954; Amendment to Answer of Defendant International Airports, Inc.; Special Verdict; Plaintiff's Supplemental Memorandum of Law; Stipulation of Disclaimer and for Judgment; Memorandum of Decision; Reply to Counterclaim; Notice of Motion to Apply Property of Judgment Debtors Toward Satisfaction of Judgment; Findings of Fact and Conclusions of Law; Judgment; Notice of Filing of Motions; Motion for New Trial; and Motion to Amend Findings of Fact, Conclusions of Law, and Judgment; Points and Authorities; Order Granting Motion of Defendant International Airports, Inc., to Apply Property of Judgment Debtors Toward Satisfaction of Judgment; Order Denying Motions of Plaintiff for New Trial and to Amend Findings of Fact, Conclusions of Law, and Judgment; Notice of Appeal From Order Denying Motions of Plaintiff for New Trial and to Amend Findings of Fact, Conclusions of Law, and Judgment; Notice of Appeal From Final Judgment; Designation of Record on Appeal; Statement of Points Upon Which Appellant In-

tends to Rely on Appeal, which, together with the original exhibits and Reporter's Transcript of Proceedings on November 9, 1953; August 23, 1954; August 26, 1954; October 12, 1954; October 14, 1954; October 15, 1954; October 18, 1954; October 27, 1954; October 28, 1954; October 29, 1954; November 2 and 3, 1954; November 4, 1954, and November 5, 1954, in fourteen volumes, transmitted herewith, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 20th day of May, A.D. 1955.

[Seal]

EDMUND L. SMITH,
Clerk;

By /s/ THEODORE HOCKE,
Chief Deputy.

[Title of District Court and Cause.]

NOTICE OF APPEAL FROM FINAL JUDGMENT

Notice is hereby given that the Vineland Elementary School District of Kern County, one of the defendants herein, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final Judgment entered in this action on February 8, 1955.

Dated: May 26, 1955.

ROY GARGANO,
County Counsel;

By /s/ KIT L. NELSON,

Assistant County Counsel, Attorneys for Defendant
Vineland Elementary School District.

Affidavit of service by mail attached.

[Endorsed]: Filed May 27, 1955. [2*]

[Title of District Court and Cause.]

ORDER FOR EXTENSION OF TIME TO FILE
RECORD AND DOCKET APPEAL

On motion of defendant Vineland Elementary School District, appellant herein, It Is Ordered that the time within which the said defendant and appellant may file the record and docket the appeal herein shall be, and hereby is, extended to and including the 12th day of July, 1955.

Dated this 5th of July, 1955.

/s/ LEON R. YANKWICH,
United States District Judge.

Affidavit of service by mail attached.

[Endorsed]: Filed July 5, 1955. [4]

*Page numbering appearing at foot of page of original Certified Transcript of Record.

[Title of District Court and Cause.]

STATEMENT BY APPELLANT OF POINTS
ON WHICH IT INTENDS TO RELY

To the Clerk of the United States District Court
for the Southern District of California, Central
Division:

I.

Pursuant to Rule 75(d) of the Federal Rules of Civil Procedure, Appellant submits the following concise statement of points upon which he intends to rely on appeal:

A. The District Court erred in failing to rule that the sale of the aircraft in suit by the defendant School District to defendants Finn was illegal and void.

B. The District Court erred in failing to rule that the agreement between defendants Finn and defendant School District of February 28, 1951, (Vineland's Exhibit B), a Bill of Sale signed by Peter A. Bancroft in favor of defendants Finn concerning the aircraft in suit, dated February 28, 1951, (Finns' Exhibit K-4,) and any other agreements and instruments [6] concerning the sale of the aircraft in suit by defendant School District to defendants Finn, were illegal and void.

C. The District Court erred in failing to adjudge rescission:

1. Of the sale of the aircraft in suit by the defendant School District to the defendants Finn;

2. Of that certain agreement, dated February 28, 1951, by and between School District and defendants Finn (Vineland's Exhibit B); and

3. Of that certain bill of sale, signed by Peter A. Bancroft in favor of defendants Finn, dated February 28, 1951, (Finn's Exhibit K-4); and to adjudge the School District had full right, title and interest and right to possession of the aircraft in suit on the following grounds:

(a) The consent of defendant School District to said sale, agreement and bill of sale was obtained through misrepresentation on the part of the defendants Finn.

(b) Through the fault of defendants Finn, the consideration for the subject sale, agreement and bill of sale, and any and all agreements and instruments in connection therewith, have failed, in whole and in part.

(c) Through the fault of defendants Finn, the consideration for said subject sale, agreement and bill of sale, and any and all agreements and instruments in connection therewith, has become entirely void.

(d) Through the fault of defendants Finn, the consideration for the subject sale, agreement and bill of sale, and any and all agreements and instruments in connection therewith, has failed in a material respect.

(e) Defendants Finn have repudiated the contract for sale of the aircraft in suit and have manifested their inability to perform their obligations thereunder and have committed a material breach thereof. [7]

(f) The public interest would be prejudiced by permitting the subject sale, and any and all agreements and instruments in connection therewith, to stand.

D. The District Court erred in failing to rule that the agreement by and between the defendant School District and defendants Finn, dated February 28, 1951 (Vineland's Exhibit B), was a conditional sales contract, and that a condition or conditions hereof had been breached by defendants Finn, and to adjudge defendant School District has the right of possession to the aircraft in suit and full right, title and interest thereto.

E. The District Court erred in failing to rule that in accordance with the agreement by and between the defendant School District and defendants Finn, dated February 28, 1951 (Vineland's Exhibit B), right, title, and interest to the aircraft in suit did not pass to defendants Finn until all conditions of said agreement should be performed by defendants Finn, and particularly the provision requiring waivers and consent of the United States Government and its agencies to the said sale; and not in adjudging that said conditions had not been performed and that, therefore, the defendant School Dis-

trict was entitled to immediate possession of the aircraft in suit, and was the owner of all right, title and interest thereto.

Dated: July 8, 1955.

ROY GARGANO,
County Counsel;

By /s/ KIT L. NELSON,
Assistant County Counsel, Attorneys for Appellant
Vineland Elementary School District.

Affidavit of service by mail attached.

[Endorsed]: Filed July 11, 1955. [8]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 11, inclusive, contain the original:

Notice of appeal from Final Judgment;

Order for Extension of Time to File Record
and Docket Appeal;

Statement by Appellant of Points on which
it Intends to Rely;

Designation of Record;

constitute the transcript of record on appeal to
the United States Court of Appeals for the Ninth
Circuit.

I further certify that my fees for preparing the foregoing record amount to \$1.60, which sum has been paid by appellant.

Witness my hand and the seal of said District Court, this 29th day of July, 1955.

[Seal]

JOHN A. CHILDRESS,
Clerk.

/s/ CHARLES E. JONES,
Deputy.

[Endorsed]: No. 14770. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. George C. Finn, Charles C. Finn, International Airports, Inc., a Corporation; Peter A. Bancroft and Vineland Elementary School District of Kern County, Appellees, and Vineland Elementary School District of Kern County, California, Appellant, vs. United States of America, George C. Finn, Charles C. Finn, International Airports, Inc., Appellees. Transcript of Record. Appeals from the United States District Court for the Southern District of California, Central Division.

Filed May 23, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14770

UNITED STATES OF AMERICA,

Appellant,

vs.

GEORGE C. FINN, CHARLES C. FINN, INTERNATIONAL AIRPORTS, INC.; PETER A. BANCROFT, VINELAND ELEMENTARY SCHOOL DISTRICT OF KERN COUNTY,

Appellees.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY (RULE 17(6), RULES, COURT OF APPEALS, NINTH CIRCUIT)

The United States of America, appellant, states that the points on which it intends to rely in the above-captioned appeal are as follows:

1. The District Court erred in ruling that the provisions concerning certain uses of aeronautical property contained in Section 8304.11(b), 32 C.F.R. 1946 Supp., are contrary to the provisions and objectives of the Surplus Property Act of 1944 (58 Stat. 766, 50 U.S.C. App. Sec. 1611) and are invalid.

2. The District Court erred in ruling that the provisions concerning the use and sale of aeronauti-

cal property contained in the Form 65 Agreement (Plaintiff's Exhibit 1) are contrary to the provisions and objectives of the Surplus Property Act of 1944 (50 Stat. 766, 50 U.S.C. App. Sec. 1611) and are invalid.

3. The District Court erred in ruling that the provisions concerning the use and sale of aeronautical property contained in the Form 65 Agreement (Plaintiff's Exhibit 1) are contradictory to those contained in Sec. 8304.11(b), 32 C.F.R. 1946 Supp., and are invalid.

4. The District Court erred in failing to rule that the defendants, and each of them, are estopped to challenge the validity of Sec. 8304.11(b), 32 C.F.R. 1946 Supp., and of the Form 65 Agreement (Plaintiff's Exhibit 1).

5. The District Court erred in failing to rule that questions of validity of the Form 65 Agreement (Plaintiff's Exhibit 1) are immaterial by reason of rendition by plaintiff of the consideration to be furnished by it pursuant to said instrument.

6. The District Court erred in failing to rule that plaintiff had title to and the right to possession of the aircraft in suit at all times from February 28, 1951, to the date of Judgment, and in failing to rule that no defendant had the power to make any transfer or hypothecation of said aircraft.

7. The District Court erred in failing to rule that whatever interest was acquired by the defendant Vineland Elementary School District in or to

the aircraft in suit was subject to a trust for educational uses.

8. The District Court erred in ruling that the War Assets Administration transferred to the defendant Vineland Elementary School District full ownership, both legal and equitable, in and to the aircraft in suit.

9. The District Court erred in ruling that the defendant Vineland Elementary School District sold and transferred and delivered to defendants George C. Finn and Charles C. Finn all of its right, title and interest in and to the aircraft in suit.

10. The District Court erred in failing to find that at all times pertinent to this action, and particularly during the period from July 25, 1946, to the date of Judgment, the aircraft in suit was fit for use by a tax-supported institution for non-flight instructional purposes, has never been "scrap," and has never been "rendered unfit and useless except for its basic material content" within the meaning of the "Agreement" (Plaintiff's Exhibit 1).

11. The District Court erred in failing to award damages in favor of plaintiff and against all defendants for loss of use of the aircraft in suit from February 28, 1951, through September 18, 1952, and from January 18, 1953, through February 1, 1953.

12. The District Court erred in failing to grant specific performance of the Form 65 Agreement (Plaintiff's Exhibit 1).

13. The District Court erred in failing to enjoin future violations of the terms and conditions of the Form 65 Agreement (Plaintiff's Exhibit 1) on the part of each of the defendants.

14. The District Court erred in failing to award damages in favor of plaintiff and against defendant Vineland Elementary School District for breach of the Form 65 Agreement (Plaintiff's Exhibit 1).

15. The District Court erred in failing to award damages to plaintiff and against the defendants George C. Finn and Charles C. Finn for inducing a breach of the Form 65 Agreement (Plaintiff's Exhibit 1).

16. The District Court erred in ruling that it had jurisdiction with respect to the Counterclaim of the defendants George C. Finn and Charles C. Finn.

17. The District Court erred in ruling that it had jurisdiction to grant affirmative relief on the Counterclaim of the defendants George C. Finn and Charles C. Finn.

18. The District Court Court erred in granting relief on the Counterclaim of the defendants Finn because the Counterclaimants did not comply with Title 28, Section 2406, United States Code.

19. The District Court erred in refusing to make a finding with respect to right of possession as between all parties.

20. The District Court erred in failing to adju-

dedicate all claims to the aircraft in suit asserted by parties to this action.

21. The District Court erred in refusing to give effect to the proceedings, process and Judgment of the Superior Court of the State of California in and for the County of Los Angeles in *International Airports, Inc., v. Charles C. Finn, et al.*, Nos. 599,-895 and 600,291 (consolidated cases).

22. The District Court erred in ruling that as between plaintiff and all defendants the defendants Finn had the right to possession of the aircraft in suit on July 3, 1952, and at all times thereafter, and in awarding damages to the said defendants Finn on their Counterclaim for loss of use of said aircraft during said period, for the following reasons:

a. During the described period plaintiff had the right to possession of the aircraft in suit.

b. During the described period the defendant Vineland Elementary School District had a right to possession of the said aircraft superior to that of the defendants Finn.

c. During the period in question the defendant *International Airports, Inc.*, had a right to possession of the said aircraft superior to that of the defendants Finn.

23. The District Court erred in awarding damages for loss of use of the aircraft in suit for a period subsequent to the date of Judgment herein.

24. The District Court erred in awarding damages for loss of use of the aircraft in suit for a period subsequent to its Order Granting Motion of Defendant International Airports, Inc., to Apply Property of Judgment Debtors Toward Satisfaction of Judgment.

25. The District Court erred in finding the fair market value of the aircraft in suit on July 3, 1952, and on September 18, 1952, to be \$50,000, and in making an alternative award of said sum to the counterclaimants, for the following reasons:

a. The said Finding of Fact is clearly erroneous, is unsupported by the evidence, and is against the weight of the evidence.

b. The said finding of fair market value on September 18, 1952, was based upon the answer of the advisory jury to Interrogatory 20, which finding of the advisory jury:

1. Was made with respect to a different time and issue;

2. Appears to be the result of passion or prejudice induced by the misconduct of the counter-claimants.

3. Is clearly erroneous, unsupported by the evidence, and against the weight of the evidence.

26. The District Court erred in denying the Motions of plaintiff for New Trial and to Amend

Findings of Fact, Conclusions of Law, and Judgment.

Dated: May 31, 1955.

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant United States Attorney, Chief of Civil
Division;

/s/ LOUIS LEE ABBOTT,
Assistant United States Attorney, Attorneys for
Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 2, 1955.

[Title of Court of Appeals and Cause.]

MOTION FOR CONSIDERATION OF
EXHIBITS IN ORIGINAL FORM AND
FOR OMISSION OF EXHIBITS FROM
PRINTED TRANSCRIPT OF RECORD

Comes Now the appellant, United States of America, and moves that the original exhibits transmitted by the Clerk of the United States District Court in this cause be considered by this Court in their original form, and that none of said original exhibits be included in the printed transcript of record except insofar as said exhibits have been incorporated by reference into the pleadings of the

parties. The original exhibits transmitted by the Clerk of the United States District Court are as follows:

Exhibits

Plaintiff's Exhibits: 1, 2, 4, 5, 6, 7, 9, 10, 12, 13, 14, 15, 17, 18, 19.

Defendant Vineland's Exhibits: A, B, C, D, E, F, G.

Defendant International's Exhibits: A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U-1 through U-5.

Defendants' Finn Exhibits: B, E, K-1 through K-22, L, S, X, A-X.

Said Motion is made upon the following grounds:

1. The exhibits in this cause are voluminous. To print each of said exhibits in its entirety would be impracticable and expensive.

2. Certain documents basic to the claims of the litigants have been incorporated by reference into their pleadings and will therefore be included in the printed transcript of record. The designations of those documents in the pleadings of the parties and in the District Court record are as follows:

Document: Agreement dated June 25, 1946.

Designation in Pleadings: Complaint, Exhibit A.

District Court Exhibit Designation: Plaintiff's Exhibit 1.

Document: Agreement dated August 31, 1951.

Designation in Pleadings: Answer of Defendant International Airports, Inc., to Amended Complaint, Exhibit A.

District Court Exhibit Designation Defendant International's Exhibit E.

Document: Aircraft Chattel Mortgage, dated August 31, 1951.

Designation in Pleadings: Answer of Defendant International Airports' Inc., to Amended Complaint, Exhibit B.

District Court Exhibit Designation Defendant International's Exhibit B.

Document: Notice for Bids, dated January 6, 1951.

Designation in Pleadings: Answer to Amended Complaint for Declaratory Relief, Breach of Contract and Claim and Delivery (Defendants Vineland Elementary School District and Peter A. Bancroft) Exhibit A.

District Court Exhibit Designation: Defendant Vineland's Exhibit A.

Document: Agreement dated February 28, 1951.

Designation in Pleadings: Answer to Amended Complaint for Declaratory Relief, Breach of Contract and Claim and Delivery (Defendants Vineland Elementary School District and Peter A. Bancroft) Exhibit B.

District Court Exhibit Designation: Defendant Vineland's Exhibit B.

Dated: May 31, 1955.

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Assistant United States Attorney, Attorneys for
Appellant.

Points and Authorities

Rule 76 (1) (o), Federal Rules of Civil Procedure.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 2, 1955.

No. 14770

**In the United States Court of Appeals
for the Ninth Circuit**

UNITED STATES OF AMERICA, APPELLANT

v.

GEORGE C. FINN, CHARLES C. FINN, INTERNATIONAL AIRPORTS,
INC., A CORPORATION, PETER A. BANCROFT AND VINELAND
ELEMENTARY SCHOOL DISTRICT OF KERN COUNTY, APPELLEES

AND

VINELAND ELEMENTARY SCHOOL DISTRICT OF KERN COUNTY,
CALIFORNIA, APPELLANT

v.

UNITED STATES OF AMERICA, GEORGE C. FINN, CHARLES C.
FINN, AND INTERNATIONAL AIRPORTS, INC., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR THE UNITED STATES

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In the United States Court of Appeals for the Ninth Circuit

No. 14770

UNITED STATES OF AMERICA, APPELLANT

v.

GEORGE C. FINN, CHARLES C. FINN, INTERNATIONAL AIRPORTS,
INC., A CORPORATION, PETER A. BANCROFT AND VINELAND
ELEMENTARY SCHOOL DISTRICT OF KERN COUNTY, APPELLEES

AND

VINELAND ELEMENTARY SCHOOL DISTRICT OF KERN COUNTY,
CALIFORNIA, APPELLANT

v.

UNITED STATES OF AMERICA, GEORGE C. FINN, CHARLES C.
FINN, AND INTERNATIONAL AIRPORTS, INC., APPELLEES

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION*

BRIEF FOR THE UNITED STATES

JURISDICTIONAL STATEMENT

The United States transferred a war surplus airplane to defendant Vineland School District upon application by its superintendent, defendant Peter A. Bancroft, pursuant to a postwar educational disposal program. Vineland later entered into a contract to sell and thereafter transferred possession of the plane to defendants George C. Finn and Charles C. Finn, who (a) mortgaged it to defendant International Airports, (b)

authorized International to make certain repairs, and (c) executed a lease of the plane to International. The Government brought this action against Vineland, Bancroft, the Finns, and International, contending that the terms of the transfer to Vineland imposed restrictions on Vineland's right to use or sell the plane, that these restrictions were violated by Vineland's transactions with the Finns, and that as a result of these violations the Government was entitled to retake possession of the plane and to recover damages. In addition to the answers of all defendants, the Finns filed a counterclaim seeking an affirmative judgment against the Government, claiming that the Government had deprived them of their right to use the plane when it sequestered the plane at the commencement of the action by invoking, as authorized by Rule 64 of the Federal Rules of Civil Procedure, the California claim and delivery procedure (Cal. Code Civ. Proc., secs. 509-21, *infra*, pp. 97-99).

Rejecting the Government's contention, as well as Vineland's argument that there had been no valid sale to the Finns, the District Court adjudged that the Finns had title to the plane subject only to certain claims by International (R. 156-157, 160-161).¹ The court below also ordered, on the basis of the Finns' counterclaim, that the Government return the plane to the Finns in the same condition as it was when originally sequestered, ordinary wear and tear excepted, or pay the Finns its monetary equivalent (found to be \$50,000), and that it pay the Finns \$15 per day for each day from the date of the seizure that they are denied possession thereof (R. 160-161). An order denying a timely motion for new trial, or to amend the findings and the judgment (R. 162-173), was filed on March 31, 1955 (R. 179). The United States filed its notice of appeal from the judgment on April 13, 1955 (R. 180-181), and Vineland filed a notice of appeal on May 27, 1955 (R. 994-995).

¹ References to the printed record are designated (R. —). Many of the exhibits relevant to this appeal were not reprinted, but a motion was filed requesting the court to consider those exhibits in their original form (R. 1007-1010). References to those exhibits are designated by the original exhibit number. A complete list of those exhibits with a brief description of each is set forth in Appendix A, *infra*, pp. 75-80.

The Government's action invoked the district court's jurisdiction under 28 U. S. C. 1345; the counterclaim set forth no statutory ground for jurisdiction of the court below (R. 101-106) and the existence of such jurisdiction is contested *infra*, pp. 56-66. This Court's jurisdiction rests on 28 U. S. C. 1291.

STATEMENT OF THE CASE

1. *The Government's transfer to Vineland.* Early in 1946, the Office of Aircraft Disposal of the War Assets Administration notified a large number of educational institutions, including Vineland, that surplus aircraft were available to them under a special educational disposal program. Vineland was interested in acquiring such planes, so its superintendent engaged in extensive correspondence with various Government officials (R. 222-227). One circular received by Vineland (Vineland's Exhibit E) advised that certain aeronautical property would be distributed "to eligible educational institutions at nominal prices for ground instruction, research, and experimentation" and instructed interested schools to apply by submitting two completed copies "of the enclosed WAA Form 65" which would "suffice for all future transactions under the provisions of this plan." On June 25, 1946, Vineland's superintendent, Peter Bancroft, executed War Assets Administration ^{not} Forms 65 and 66 (entitled "Purchase Order") in order to obtain such surplus aeronautical property (R. 14-18; Vineland's Exhibit D).

The WAA Form 65 Agreement repeated the instruction that it "shall be effective for all future transfers of Aeronautical Property under the provisions of Surplus Property Administration Regulation No. 4, as amended from time to time" (see par. 8, R. 16). In the Agreement, Vineland certified that it is an "educational institution" within the meaning given by the Surplus Property Act (see par. 1, R. 14), that the property to be acquired is for the sole use of a tax-supported or nonprofit institution for nonflight instructional purposes (see par. 2, R. 15), and "[t]hat the acquired property will not be used for any actual flight purposes" (see par. 6, R. 15). In addition, Vineland agreed "[t]hat all property when unfit for the above purpose will be sold only as scrap and then only after it shall have

been rendered completely unfit and useless except for its basic material content" and that "[s]ales consummated within three (3) years of the date of acquisition must have the prior approval of the Disposal Agency" (see par. 7, R. 15-16).

In response to Vineland's specification on WAA Form 66 of the type of aircraft which it wished, Vineland was allocated a C-46A Curtiss Commando Airplane. This type of aircraft, a two engine land plane suitable for passenger or freight transportation, had a market price of \$5,000 at that time (R. 116, 150) and was being sold by the War Assets Administration for that amount to ordinary purchasers without restrictions on subsequent use or resale (R. 281, 300). However, the plane was delivered to Vineland upon payment of only \$200 (Plaintiff's Exhibit 4, 7),² the price set for transfers of this type of aircraft to educational institutions (Vineland's Exhibit E), pursuant to section 13 (a) (1) (C) of the Surplus Property Act of 1944 (58 Stat. 765):

In fixing the sale or lease value of property to be disposed of under subparagraph (A) [*i. e.* educational disposal]. * * * the Board shall take into consideration any benefit which has accrued or may accrue to the United States from the use of such property by any State, political subdivision, instrumentality, or institution.

Vineland's payment was forwarded to the War Assets Administration by Peter Bancroft, as Vineland's agent, and on July 10, 1946, receipt was acknowledged on a WAA Sales Receipt form (Document 1 of International's Exhibit A).

When Vineland picked up the plane on July 25, 1946, its representatives, the WAA representative and the local storage contractor executed WAA Form SWPD-DP 1316 (entitled "Release of Custody of Aircraft") (R. 125). The Form 1316 (Plaintiff's Exhibit 4) was intended primarily to evidence the release of all claims on the plane which might be made by the

² The total amount paid was \$300 (R. 126, 226), but \$100 thereof was allocable to a smaller plane which was transferred at the same time (Plaintiff's Exhibit 7; Sales Receipt—Document 1 of International's Exhibit A) and which is not involved in this action.

storage contractor. However, the nature of the transfer is also indicated by the large stamp "EDUCATIONAL DISPOSAL" and by the typewritten legend "[t]his aircraft was sold for educational use only." Vineland's representative acknowledged "receipt" of the aircraft on that Form 1316. No other document in the nature of a bill of sale or a certificate of title was ever issued to Vineland (R. 125, 228-230).

2. *The period of Vineland's possession.* The plane was flown to the Sunset School strip in Vineland's district where it was used as a classroom and for other educational purposes until it was removed by the Finns on October 23, 1951, pursuant to their contract with Vineland executed on February 28, 1951. During the period that they held the plane, Vineland's officials were reminded of the restrictions imposed on such surplus transfers and the Government's claim of an interest in planes so transferred on at least two separate occasions. On or about March 18, 1948, Vineland received another C-46 for \$200, and the document noting the transfer (International's Exhibit U-2) specified that the "[a]ircraft will be disposed of under provisions of SPA REGULATION #4 for nonflight ground instruction purposes only and is not for resale." The memorandum added that in that transfer, as in the transfer here involved, "[n]o certificate of title will be issued."

Later, the Federal Security Agency's Property Utilization Bulletin No. 6 (Plaintiff's Exhibit 15) was sent to interested educational institutions, including Vineland. That bulletin, dated January 10, 1951, described the program under which the armed forces intended to "exercise recapture" of some aircraft previously transferred to schools that had become excess to the needs of the schools holding them. The Government there asserted its right to retake planes which were no longer needed for educational purposes, subject only to the assurance that the schools, from which the planes were recaptured, would be reimbursed for "out of pocket expenses incurred by the institution in the acquisition of the aircraft" (Plaintiff's Exhibit 15).

The fact that Vineland recognized and accepted the limitations on its rights under the transfer is shown by its negotiations with the Finns (see *infra*, pp. 6-8) and by a letter written

by its superintendent to the state agency for surplus property on April 30, 1951. In that letter (Plaintiff's Exhibit 18), Vineland's superintendent assured the state agency that Vineland had no planes which would be subject to recapture since "[n]one of these units are surplus to us due to the fact that we are still using them regularly." He added that Vineland had an AT-6 plane which they wished to exchange, if War Assets regulations would permit such a transaction, and he asked whether there was "any legal way" that a plane received under the surplus property program could be traded for a smaller plane (Plaintiff's Exhibit 18).

3. *Vineland's dealings with the Finns.* Late in 1950, the Finns approached Vineland with various propositions for the purchase of the plane (R. 238-40), and in a letter dated December 5, 1950 (Vineland's Exhibit C), the Finns made a formal offer to buy the plane. Although this offer, like its predecessors, was rejected (R. 248, 514), it engendered considerable discussion among the members of Vineland's board of trustees (R. 250) and lead to the posting of notices calling for bids, as required by the California statutes regarding the sale of public property. The notices (R. 57-58) cautioned that "[b]idders are expressly notified that the aforesaid aircraft was acquired by the district from the Government of the United States and the War Assets Administration, subject to certain restrictions on the use thereof under the deed of conveyance, and the successful bidder will be required to secure the necessary release to said restrictions from the proper governmental agency of the United States of America" (R. 57-58).

The Finns' bid (Finns' Exhibit L), which was the only one submitted (R. 150), provided for payment of \$5,000 cash, transfer to Vineland of another C-46 as a replacement for the plane being sold, and the performance of certain work specified in the notice for bids. The Government's interest in the plane and its right to prevent a sale was explicitly recognized in the bid:

It is the understanding of the undersigned bidders that the performance of the above conditions is contingent upon their securing the necessary releases to any restrictions placed on the said C-46 Aircraft #23645

by the United States Government, or proper agency thereof.

The effect of possible failure to obtain permission from the Government was also treated in their bid:

It is the further understanding of the undersigned bidders that they may elect, at their option, to perform the above conditions in full even though proper releases cannot be obtained, provided, however, that adequate assurance is given to the Vineland School District that said C-46 Aircraft #23645 will not be used for flying purposes. In the event such option is exercised by the undersigned the Vineland School District shall be obligated to complete said sale under the terms and conditions specified.

Vineland's board of trustees in due time accepted the Finns' bid (R. 255) and on February 28, 1951, Vineland and the Finns entered into an "Agreement" (R. 59-66). While in Paragraph I of the agreement Vineland undertook concurrently with the execution of the agreement to transfer "all its right, title, and interest" in the plane and to execute "a Bill of Sale and/or transfer of title to the said aircraft * * *" (R. 6),³ the Finns in Paragraph II agreed that "irregardless of the transfer of possession and title of the said C-46 Aircraft #23645, the sole use of said aircraft shall be and the same is reserved to the District for educational purposes only, until such time as all of the terms and conditions set forth in this agreement are fully performed by * * * [the Finns]," subject further to a right in the Finns to make repairs on the plane on the school premises (R. 60-61).⁴

³ On the same day (February 28, 1951), Vineland's superintendent signed a CAA Form Bill of Sale on Vineland's behalf (Document 2 of International's Exhibit A). The Bill of Sale, however, was not acknowledged before a notary public until April 14, 1951. It should also be noted that the Bill of Sale states that the conveyance was made "as per agreement dated February 28, 1951."

⁴ The consideration due from the Finns, which was set forth in Paragraph III (R. 61-62), was substantially the same as that required by the notice for bids and offered by the Finns in their bid of January 19. Because the consideration included property, services, and cash it is not cer-

The Agreement went on in Paragraph IV to recognize the Government's interest in the plane (R. 62):

It Is Expressly Agreed and Understood, that this agreement is contingent upon * * * [the Finns'] ability to secure the necessary clearances from the Government of the United States of America on restrictions now existing on the use and possession of the afore-described C-46 Aircraft # 23645, by virtue of the Deed of Conveyance of said aircraft from the said Government of the United States to * * * [Vineland], and by virtue of related federal laws on the use thereof.

The Finns were allowed six months "to secure the aforesaid clearance from the Government of the United States of America" (R. 62-63), with an additional six months if at that time they had been unable, but were willing to continue trying, to obtain the requisite clearance (R. 63). Inability to obtain such permission from the Government would excuse most of the Finns' undertakings (R. 63) provided that they promptly reconveyed the original C-46 back to Vineland (R. 64). However, "[i]n the event the * * * [the Finns] are unable to secure the aforesaid Governmental releases within one (1) year from the date of this agreement * * *, then and in that event * * * [the Finns] shall, nevertheless, be entitled to delivery of the aforesaid C-46 Aircraft #23645 for salvage purposes only [⁵] provided satisfactory assurance is given to * * * [Vineland] that existing Governmental restrictions will not be violated by * * * [the Finns] or by any other person, firm or corporation, with or without the consent of * * * [the Finns]" (R. 64).

4. *The Finns' dealings with the Government.* Thereafter George Finn, acting on behalf of himself and his brother, proceeded to seek governmental approval. During various con-

tain what liquidated value could be attached to it. The Finns alleged in their counterclaim that \$21,000 was paid for the plane (R. 104), and the evidence indicates that this was a reasonable valuation of the plane at that time (R. 150, 116, 286).

⁵ For a discussion of the difference between the use for salvage purposes (mentioned here) and use as scrap for basic material content (as required by WAA Form 65) see *infra*, pp. 54-55.

ferences in Washington, he was advised by representatives of the Federal Security Agency, the agency then authorized to release the terms and conditions imposed on transfers to educational institutions (R. 151), that the restrictions on use and sale of planes transferred to schools were not being released at that time (R. 686, 824). These representatives pointed out that they personally were not authorized to consent to any release of the conditions (R. 687, 693-695) and that it was extremely unlikely that those who were empowered to do so would consent, since the head of the agency had established this policy upon the request of the Department of Defense and the Department of State in order to minimize the possibility of these planes falling into the hands of unfriendly foreign governments (R. 686, 693-694, 716-718, 803, 824, Plaintiff's Exhibit 15). They suggested to George Finn that if he wished to pursue the matter further, he should contact the Administrator of the Federal Security Agency or one of the two other persons authorized to release the restrictions (R. 694, 825). The evidence showed that he did not obtain a release or waiver from any of those three persons (R. 693-697, 828), and the advisory jury as well as the court below so found (R. 116, 151).

5. *Further dealings between Vineland and the Finns.* Although the Finns never received a waiver of the restrictions from the Federal Security Agency, they were able to obtain a certificate of registration of title and a ferrying permit from the Aircraft Records Branch of the Civil Aeronautics Administration (R. 151). On the basis of these CAA documents, the Finns represented to Vineland, on October 23, 1951, that they had obtained permission for the sale from the Government and a waiver of all restrictions on the power to use and sell the plane (R. 265-266). Accordingly, Vineland surrendered the plane to the Finns so that certain repairs could be made off Vineland's premises (R. 113, 266, 527-528), and the Finns promptly flew it to the airport of defendant International. There is no evidence that Vineland's officials made any independent inquiry to determine whether in fact, the requisite government waiver of the restrictions had been obtained, even though the plane was still serviceable for educational purposes at that time (R.

270-271), and even though they knew that the Finns intended to use the plane for commercial flight purposes (R. 151).⁶

6. *The Finns' transactions with International.* Shortly before the plane was taken to International's airport, the Finns and International entered into a comprehensive contract (International's Exhibit E) under which International would make the repairs necessary for the plane to meet CAA requirements for commercial passenger service; International would loan the Finns \$15,000, secured by their promissory note for that amount and a chattel mortgage on the plane; and International would lease the plane from the Finns for 18 months after the repairs were completed at \$5,000 per month (International's Exhibit C). In the mortgage instrument (R. 35-39), the Finns warranted that they were the absolute owners of the legal and beneficial title to the aircraft and that it was subject to no liens or adverse claims (R. 37). The advisory jury, however, found that International had knowledge or notice of the Government's claim that Vineland's right to use or sell the plane was restricted as well as of Vineland's own claim to the plane (R. 114-115).

The plane was delivered to International on or about October 26, 1951, where it remained until May 25, 1952 (R. 152); during that time International made repairs, the reasonable value of which was \$10,200 (R. 152). On May 25, 1952, the Finns retook possession of the plane without International's consent and flew it to Burbank, California (R. 476-479). As a result, on May 28, 1952, International brought suit against the Finns in the Los Angeles Superior Court to recover the plane under California claim and delivery procedure (R. 153; International's Exhibits N and O). On June 9, 1952, International brought a second suit against the Finns in the same court seeking a foreclosure of the chattel mortgage (R. 153; International's Exhibit Q). International obtained possession of the plane from the Sheriff of Los Angeles County on June 13, 1952, when the Finns failed to post a redelivery bond in accordance with the state procedure (R. 153-154). Subsequently, however, the Finns, for a second time, took possession of the plane without

⁶ As of the date of the trial, the Finns had not paid any portion of the \$5,000 due under their contract with Vineland and had supplied only a part of the labor and materials specified in the agreement (R. 473).

International's permission and prevented International from recovering it (R. 154). International's suits eventuated in a judgment dated February 7, 1953, in which it was ruled that International was entitled to possession of the plane as against the Finns, that the mortgage should be foreclosed, that the Finns were personally liable on their \$15,000 note, and that International had a valid claim against the Finns for \$10,014.43 with interest as an aircraft lien or as an *in personam* claim (International's Exhibit D).

7. *Pertinent proceedings below.* This action was commenced on July 3, 1952. The Government's complaint, as amended (R. 3-13, 18-27), named as defendants, Vineland, its superintendent Peter A. Bancroft, the Finns and International⁷ and sought, *inter alia*, a declaratory judgment that the Government had title to the plane and an immediate right to possession, damages from Vineland for the breach of contract, and damages from the Finns and Peter Bancroft for inducing that breach (R. 12-13, 27-38). Shortly after commencing its original action, and ancillary thereto, the Government amended its original complaint to add a count invoking the claim and delivery procedure of California (Calif. Code Civil Proc., sec. 509-521, *infra*, pp. 97-99), just as International had previously done in the state court (see *supra*, p. 10). Upon receipt of the affidavit of the Assistant United States Attorney representing the Government, the Marshal, as an officer of the court, took possession of the plane on September 18, 1952. The Marshal delivered it to the Government on October 13, 1952, when the Finns failed to execute the redelivery bond required by the California statute as a prerequisite to obtaining repossession of the plane (R. 154). In spite of a court order that the Government's possession of the plane should not be interfered with by any of the defendants pending final judgment in the proceeding (R. 40-42), the Finns seized the plane

⁷ Also named as defendant was Seaboard Surety Co., as to whom, the complaint alleged, on information and belief, that the Finns had issued a bill of sale for the plane (R. 8). Seaboard filed a disclaimer of interest and by stipulation, was dismissed from the proceeding without costs (R. 149).

on January 18, 1953, and held it until recovered by the Government on February 1, 1953 (R. 154-155).

Meanwhile, the various defendants filed their answers raising somewhat different defenses to the Government's claim of title and right to possession. Vineland's answer (R. 46-57) asserted that while it had contracted to sell the plane to the Finns, the agreement was conditioned on the Finns' obtaining the necessary waivers from the Government and that the Finns had obtained possession of the plane from Vineland by falsely representing that they had obtained the required waivers; consequently, Vineland claimed that title to the plane continued to reside in it and it had not breached its contract with the Government.

The Finns' answer (R. 67-72, see also R. 101-102) claimed that Vineland had received good title from the Government and had conveyed same to the Finns, and that the Government had consented to the sale to the Finns by the issuance of CAA registration. In addition, the Finns filed a counterclaim against the Government (R. 101-106),⁸ seeking a return of the plane and damages for the period during which they were deprived of its use.

Finally, International's answer, as amended (R. 29-34, 107-111), asserted that the chattel mortgage and the statutory aircraft lien gave it a right to the plane superior to that of the other claimants including the Government; in addition to agreeing with the Finns that the Finns had title to the plane by virtue of the Government's transfer to Vineland and the latter's transfer to the Finns, International alleged that it was entitled to the protection of a good faith purchaser who acted without notice of other claims, and that the Government was estopped because International had relied upon representations by the Civil Aeronautics Authority that the Finns had title.

⁸ This pleading was originally filed as a "Cross-Complaint" (R. 73-84). The District Judge dismissed the cross-complaint on August 30, 1954, as an improper pleading, but gave the Finns leave to file a counterclaim (R. 100) which they did.

Although no party made a timely request for a jury trial,⁹ the District Court empaneled an advisory jury. At the close of the trial at which extensive oral testimony was taken and a large number of exhibits were admitted,¹⁰ written interrogatories were submitted by the court to the jury. Each of the responses of the jury (R. 111–117) was accepted by the District Court and incorporated into its Findings of Facts (R. 156). The District Court also entered a Memorandum of Decision (R. 125–144) and Conclusions of Law (R. 156–158).

The District Court ruled that the Government had transferred full ownership, both legal and equitable, in the plane to Vineland without any restrictions or reservations of interest, and that even if WAA Form 65 (R. 14–16, *supra*, p. 3) did undertake to impose restrictions, those restrictions were contrary to the governing regulation (WAA Regulation No. 4, *infra*, pp. 89–96) and the Surplus Property Act of 1944 (*infra*, pp. 81–84) and so invalid. The court went on to hold that Vineland had in turn conveyed its entire interest in the plane to the Finns, and so it concluded that the Finns were now entitled to possession of the plane subject to International's claims against the Finns. The court also held that it had jurisdiction to award an affirmative judgment against the United States on the Finn's counterclaim and ordered the Government to return the plane in the same condition as it was seized, ordinary wear and tear excepted, or its monetary equivalent (\$50,000) to the Finns¹¹ with damages (\$15 per day) for the

⁹ When their untimely request for a jury trial was denied, the Finns protested that they were being denied their constitutional rights, and although they were appearing in *propria persona*, they refused for a while at least to participate in the trial (R. 197 ff.).

¹⁰ For the Court's convenience, we have set out in Appendix A, *infra*, pp. 75–80, a list of the exhibits accompanied by a brief description of each.

¹¹ By supplemental order, the Court directed that if the Government should elect to return the plane, possession thereof should be delivered to International and be held subject to International's claims against the Finns as determined by the Los Angeles Superior Court (see *supra*, p. 11) (R. 175–177).

period during which the Finns were deprived of its use (R. 160-161).¹²

STATUTES AND REGULATION INVOLVED

The relevant provisions of the Surplus Property Act of 1944 (58 Stat. 765), as they read on June 25, 1946 (the date on which Vineland executed WAA Form 65) and subsequent related acts and amendments are set forth in Appendix B, *infra*, pp. 81-89.

The pertinent provisions of California statutes establishing California claim and delivery procedure (Calif. Code Civil Proc., Secs. 509-521, 667) are set forth in pertinent part in Appendix B, *infra*, pp. 97-100.

War Assets Administration Regulation No. 4 is set forth in pertinent part, in Appendix B, *infra*, pp. 89-96.

SPECIFICATION OF ERRORS

The points on which the Government intends to rely on appeal are set forth in their entirety at pp. 1001-1007 of the printed transcript of record. Although the Government does not intend to waive any of these points on appeal, primary stress will be given to the following specification of errors:

1. The District Court erred in ruling that the provisions concerning certain use of aeronautical property contained in Section 8304.11 (b), 32 C. F. R. 1946 Supp., are contrary to the provisions and objectives of the Surplus Property Act of 1944 (58 Stat. 766, 50 U. S. C. App. Sec. 1611) and are invalid.

2. The District Court erred in ruling that the provisions concerning the use and sale of aeronautical property contained in the Form 65 Agreement (Plaintiff's Exhibit 1) are contrary to the provisions and objectives of the Surplus Property Act

¹² The damages for loss of use were phrased as \$12,300 plus the sum of \$15 per day for each and every day such delivery of possession or alternative payment herein provided is delayed after December 31, 1954 (R. 161). However, \$12,300 is merely the sum of \$15 per day from the date the Marshal seized the plane (September 18, 1952) to December 31, 1954, exclusive of the period (January 18, 1953-February 1, 1953) that the Finns had recaptured the plane.

of 1944 (50 Stat. 766, 50 U. S. C. App. Sec. 1611) and are invalid.

3. The District Court erred in ruling that the provisions concerning the use and sale of aeronautical property contained in the Form 65 Agreement (Plaintiff's Exhibit 1) are contradictory to those contained in Sec. 8304.11 (b), 32 C. F. R. 1946 Supp., and are invalid.

4. The District Court erred in failing to rule that the defendants, and each of them, are estopped to challenge the validity of Sec. 8304.11 (b), 32 C. F. R. 1946 Supp., and of the Form 65 Agreement (Plaintiff's Exhibit 1).

* * * * *

6. The District Court erred in failing to rule that plaintiff had title to and the right to possession of the aircraft in suit at all times from February 28, 1951, to the date of Judgment, and in failing to rule that no defendant had the power to make any transfer or hypothecation of said aircraft.

* * * * *

8. The District Court erred in ruling that the War Assets Administration transferred to the defendant Vineland Elementary School District full ownership, both legal and equitable, in and to the aircraft in suit.

9. The District Court erred in ruling that the defendant Vineland Elementary School District sold and transferred and delivered to defendants George C. Finn and Charles C. Finn all of its right, title, and interest in and to the aircraft in suit.

* * * * *

14. The District Court erred in failing to award damages in favor of plaintiff and against defendant Vineland Elementary School District for breach of the Form 65 Agreement (Plaintiff's Exhibit 1).

* * * * *

17. The District Court erred in ruling that it had jurisdiction to grant affirmative relief on the Counterclaim of the defendants George C. Finn and Charles C. Finn.

* * * * *

22. The District Court erred in ruling that as between plaintiff and all defendants the defendants Finn had the right to possession of the aircraft in suit on July 3, 1952, and at all times thereafter, and in awarding damages to the said defendants Finn on their Counterclaim for loss of use of said aircraft during said period, for the following reasons:

(a) During the described period plaintiff had the right to possession of the aircraft in suit.

(b) During the described period the defendant Vineland Elementary School District had a right to possession of the said aircraft superior to that of the defendants Finn.

(c) During the period in question the defendant International Airport, Inc., had a right to possession of the said aircraft superior to that of the defendants Finn.

23. The District Court erred in awarding damages for loss of use of the aircraft in suit for a period subsequent to the date of judgment herein.

INTRODUCTION AND SUMMARY OF ARGUMENT

The two principal divisions of this brief relate respectively, first, to the Government's right to recover from the various appellees on its original claim and, second, to the Government's freedom from liability under the Finn counterclaim, even assuming that the Government's original claim should be denied. In dealing with the former issue, we show that the conditions of the transfer to Vineland which were violated by ~~the~~ Vineland's transfer of the plane to the Finns are set forth in the WAA Form 65 Agreement executed by the school in applying for surplus aircraft. The court below ruled that the terms and conditions of that Agreement must be ignored or construed to be nugatory as contrary to the governing provisions of the Surplus Property Act of 1944 and War Assets Administration Regulation 4 (R. 127-136, 157). In Part I (A), *infra*, pp. 22-31, we show that the relevant provisions of the War Assets Administration Regulation 4 and WAA Form 65 are not only consistent with the statute but are in large part required by its terms. To achieve the purposes of the educational disposal program, some restrictions on transfers were necessary, and the Act gave the Board established by the Act wide powers to establish effec-

tive regulations and gave the disposal agency broad discretion in formulating specific terms and conditions. Moreover, an examination of subsequent related enactments and their legislative history makes it clear that Congress has always intended the imposition of restrictions of the type here involved and that they should be enforced in the manner undertaken by the Government in this case. Similarly, in Part I (B), *infra*, pp. 31–36, we demonstrate that the provisions of WAA Form 65 are consistent with Regulation 4. While the Regulation prescribes certain conditions for the transfer of planes to educational institutions, these conditions plainly were intended as a minimum which must be required and leave each of the several disposal agencies free to impose such additional conditions as it may deem necessary or desirable. Consequently, the requirements contained in WAA Form 65 which are in addition to those minimum conditions cannot be said to contravene Regulation 4.

Part I (C), *infra*, pp. 36–47, deals with the interest in the plane retained by the Government and its right to repossess the plane upon the breach of the terms of WAA Form 65 involved in Vineland's transaction with the Finns. We demonstrate first that the purpose and effect of WAA Form 65 was to preserve for the Government a right to retake the plane upon a breach or violation of its terms. We suggest that, in view of the power of Congress to dispose of Government property in any manner it deems appropriate, it is not necessary to categorize the exact nature of the Government's interest, which, like many commercial transactions, may fall in one or more categories (*i. e.*, here, a bailment, a trust, or a determinable fee). Whichever of these categories describes the Government's interest most precisely, the Government is entitled to recover the plane upon a breach of the terms of the transfer. The Finns and International took the plane with knowledge of the terms under which the plane was delivered to Vineland, and therefore their acquisition of the plane did not free it from the restrictions or cut off the Government's right to recover the plane for breach of the conditions.

In any case, as we show in Point I (D), *infra*, pp. 47–50, defendants are estopped to deny that the Government retained a property interest in the plane so as to secure performance of the crucial conditions or to deny that those provisions are valid

and consistent with the governing Act or regulation. With full knowledge of the disposal agency's understanding that those terms were a fundamental part of the contract and that they operated to retain a property interest in the Government, Vineland accepted delivery of the plane from the Government and acquiesced in this understanding for more than four years. The Finns and International similarly were aware of the Government's understanding. In these circumstances, defendants cannot, at the same time that they are asserting title to the plane by reason of the transfer from the Government, challenge the validity of the transfer. Moreover, if the transfer under the terms of WAA Form 65 were beyond the authority of the disposal agency, it was totally void and no interest in the plane has ever passed from the Government to Vineland, or *a fortiori*, from the school to the Finns or from the Finns to International.

Finally, in Part I (E), *infra*, pp. 50-55, we indicate precisely wherein the terms of WAA Form 65 were contravened by Vineland's transfer to the Finns, and we point out that even if the Government were not entitled to recover the plane, it should at least have been awarded damages against Vineland for breach of contract. If the district court's ruling that Vineland transferred all its right, title, and interest in the plane to the Finns is upheld, Vineland violated the prohibitions in WAA Form 65 against sale of the plane while still suitable for educational use and without first reducing it to its basic material content. At the trial, and in its appeal to this Court, Vineland has urged that title was never transferred to the Finns. If Vineland is correct, Vineland's actions *vis a vis* the Finns were still inconsistent with the terms of the Government's transfer to it since Vineland allowed the Finns to use the plane for flight purposes and ended its use for educational purposes, contrary to the express provisions and purpose of WAA Form 65. The Finns' custody of the plane, which on its face violates Form 65, resulted from Vineland's negligence in failing to make any independent inquiry as to the alleged Governmental releases, in spite of Vineland's previous difficulties with the same type problem and its familiarity with Federal and State agencies which could have settled the matter. Furthermore, the surrender of the plane to the Finns, coupled with the title documents given to the Finns by Vineland, might have per-

mitted them to convey good title to a *bona fide* purchaser, even though Vineland had not intended to convey title to the Finns, contrary to the spirit, if not the letter, of the restrictions on sales.

In Point II, *infra*, pp. 55-73, we urge that the court below erred in awarding judgment on the Finns' affirmative counterclaim. In Part II (A), *infra*, pp. 56-66, we show that the district court lacked jurisdiction to entertain such an affirmative counterclaim against the United States. The court below reasoned that there was jurisdiction over the counterclaim because the Government's use of claim and delivery procedure amounts to a taking, within the meaning of the Fifth Amendment, for which there must be just compensation, and because the Government impliedly consented to this counterclaim when it brought the action and utilized claim and delivery procedure. Under well-established principles, however, the Government's action could not be considered a Fifth Amendment taking since the Government claimed title to the plane and since the United States Attorney had no authority to effect such a taking. But even if it were a Fifth Amendment taking, the amount of the counterclaim greatly exceeds the jurisdictional limit of the district court for such actions, and there has been no consent to such a suit by way of counterclaim, rather than as an original action. With regard to the implied consent, based upon *United States v. The Thekla*, 266 U. S. 328, found by the district court, we point out that the authorities cited to support that contention have been carefully limited by the Supreme Court to a special problem in the field of admiralty litigation and that it is fundamental to the principle of sovereign immunity that only Congress may waive the immunity of the United States.

In addition, in Part II (B), *infra*, pp. 66-73, we demonstrate that the Finns were not entitled to recover on their counterclaim, even if the court below had jurisdiction to entertain that action, because they had neither title nor immediate right to possession of the plane when it was sequestered by the Government. The record shows that the Finns obtained custody of the plane from Vineland by representing that the Government had consented to a sale, and the jury found that Vineland did not intend to transfer title until that approval was

secured. Likewise Vineland's contract with the Finns provided that the sale was contingent upon the Finns' prior performance of their duties under the contract. Since Governmental consent was never obtained and since the Finns did not supply substantially the promised consideration, the Finns did not obtain title from Vineland and had no basis for a claim of a right to possession. Moreover, Vineland's sale to the Finns, even if intended, would have been void as contrary to the California statutes governing disposal of school district property. But, assuming that the Finns did obtain title from Vineland, it is clear that International had the ~~right~~ right to possession of the plane at the time this action was commenced. International's right was firmly established by an order of the Los Angeles Superior Court and by the rulings of the court below. Indeed, the Finns had possession of the plane at the time the Government sequestered it only because they had prevented International from obtaining the plane after International had secured it under California claim and delivery procedure.

ARGUMENT

I

The restrictions of WAA Form 65 under which the Government transferred the plane to Vineland are valid and Vineland's breach thereof entitled the Government to possession

In applying to the Government for surplus aircraft, Vineland executed WAA Form 65 (R. 15-16). Among the terms and conditions there agreed to by Vineland were (1) that the plane being acquired was for the *sole use*¹³ of a public (*i. e.*, tax supported) institution for a specific *non-flight* purpose (here, instruction) (paragraph 2); (2) that the plane would "not be used for any actual flight purposes" (paragraph 6); and (3) that the plane when unfit for the stated purpose would "be sold only as scrap and then only after it shall have been rendered completely unfit and useless except for its basic material content" (paragraph 7).

¹³ Emphasis supplied throughout unless otherwise indicated.

The court below ruled that despite these conditions and restrictions, the Government's transfer to Vineland operated to vest full and unencumbered title in Vineland, leaving it free, as Vineland undertook here, to sell the plane for commercial flight purposes. This holding, the district court based upon its conclusion that these restrictions exceeded the permissible limits prescribed in Section 8304.11 (b) (2)–(3) of Regulation 4 of the War Assets Administration (32 C. F. R. 1946 Supp. Sec. 8304.11 (b) (2)–(3)), and that even the restrictions required by that regulation were invalid under the Surplus Property Act of 1944. Consequently, the court held that the disposal agency was without authority to impose the terms and conditions set out in WAA Form 65.

Since it is well established that Congress can constitutionally dispose of federal property in any manner and subject to any reservations or conditions which are appropriate in the public interest (see, *e. g.*, *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 338; *United States v. City and County of San Francisco*, 310 U. S. 16, 30), there is no question that the authority of the disposal agency to impose the terms of WAA Form 65 on transfers to educational institutions depends immediately on the authorization contained in War Assets Administration Regulation 4 and ultimately upon that in the Surplus Property Act of 1944. We believe that the statute gave the disposal agency broad authority to establish and enforce these as well as other appropriate terms and conditions, that the WAA Form 65 restrictions are not prohibited by Regulation 4, that by virtue of WAA Form 65 the Government retained a proprietary interest in the plane, entitling it to recovery of the plane upon breach of the conditions, and that in any case, defendants are estopped to deny the validity of the restrictions agreed to by Vineland in originally accepting the Government's transfer of the plane to it. In addition, we believe that even if the restrictions are only contractual in nature, the United States was entitled to recover from Vineland damages for breach of the restrictions.

A. The WAA Form 65 restrictions were within the broad discretion vested in the disposal agency by the Surplus Property Act

1. *The restrictions are contemplated by the Surplus Property Act.* Section 9 (a) of the Surplus Property Act (*infra*, p. 82) provides that the "Board [originally the Surplus Property Board and later the War Assets Administration] shall prescribe regulations to effectuate the provisions of this Act," and that "[i]n formulating such regulations, the Board shall be guided by the objectives of this Act." Section 9 (b) (*infra*, p. 82) continues "[r]egulations issued pursuant to subsection (a) may, except as otherwise provided in this Act, contain provisions prescribing the extent to which, the times at which, the areas in which, the agency by which, the prices at which, *and the terms and conditions under which*, surplus property may be disposed of * * *

Disposition of property to educational institutions is dealt with specifically in Section 13 of the Act, *infra*, p. 83. Subsection (a) of that section commences with the provision that "[t]he Board shall prescribe regulations for the disposition of surplus property to States and their political subdivisions and instrumentalities" and "in formulating such regulations the Board shall be guided by the objectives of this Act and shall give effect to the following policies to the extent feasible and in the public interest."¹⁴ The policies relevant to dispositions under this provision are set out in Section 13 (a) (1) (A) *infra*, p. 83, which states that "[s]urplus property that is appropriate for school, classroom, or other educational use may be sold or leased to the States and their political subdivisions and instrumentalities * * *" and in Section 13 (a) (1) (C), *infra*, p. 83, which adds that "[i]n fixing the sale or lease value of property to be disposed of under subparagraph (A), * * * the Board shall take into consideration any benefit which has accrued or may accrue to the United States from the use of such property by any such State, political subdivision, instrumentality, or institution." The only other restriction on the manner of dis-

¹⁴ It should be noted that the property subject to disposal under Section 13 (a) was considered as having commercial value. This is clear from Section 13 (b), *infra*, p. 84, which expressly provides for the donation to educational institutions of property which is without commercial value.

posal to educational institutions appears in Section 13 (a) (2), *infra*, p. 84, which states that “[s]urplus property shall be disposed of so as to afford public and governmental institutions, non-profit or tax-supported educational institutions * * * an opportunity to fulfill, in the public interest, their legitimate needs.”

The ruling of the court below, that the Act required the disposal agency to convey all its interest in surplus property without the reservations and conditions here involved (R. 136) is not supported by the statute or the legislative history of the Act and subsequent statutes. Section 9, which governs disposals generally, clearly authorizes the Board and the disposal agency to dispose of property in whatever manner appropriate in the circumstances presented so long as the disposal technique is not otherwise prohibited or contrary to the Act’s purposes. Cf. *Kern-Limerick, Inc. v. Scurlock*, 347 U. S. 110, 116; *United States v. Newbury Mfg. Co.*, 36 F. Supp. 602 (D. Mass.).¹⁵ And Section 13 (a), in dealing more directly with educational disposals, does not further limit that authority, since it speaks of “the *disposition* of surplus property” and “*transfers*” of the property, and reiterates in three separate places that property being disposed of to educational institutions may be “sold or leased.”¹⁶

This broad delegation of authority by Congress was motivated by a recognition of the difficulty and undesirability of prescribing uniform requirements to be applicable in all of the infinite variety of situations in which surplus property was to be disposed of. See S. Rep. No. 1057, 78th Cong., 2d sess., pp. 2-6. To permit the disposal agencies to adjust the terms and conditions of a transfer so as to take into account the particular

¹⁵ In *United States v. Newbury*, *supra*, it was held that the imposition of restrictions on resale by a department of the United States in a sales contract was valid under a statute authorizing sales of certain property upon such terms “as the head of such department shall deem expedient.” The court said (36 F. Supp. at 605) :

* * * I can discover nothing unreasonable in a provision that restricts the seller to the export market. The restriction did not tend to injure the public; on the contrary, the department may very well have deemed it conducive to the economic welfare of the United States. * * *

¹⁶ In addition to Sections 13 (a) (1) (A) and 13 (a) (1) (C), *supra*, p. 22, “sold or leased” appears in Section 13 (a) (1) (B). See *infra*, p. 83.

needs and circumstances of each situation, Congress stressed the broad discretion of the disposal agencies in Sections 15 (a) and 15 (b), *infra*, p. 84: "the agency may dispose of such property by sale, exchange, lease, or transfer, for cash, credit, or other property, with or without warranty, *and upon such terms and conditions, as the agency deems proper * * **" and "[a]ny owning agency or disposal agency may execute such documents for the transfer of title *or other interest* in property or take such other action as it deems necessary to carry out the provisions of this Act * * *."

Certainly, far from being inconsistent with those provisions, the WAA Form 65 prohibitions against sale by an educational institution of property where the property is still useful for educational purposes or where it has not been reduced to its basic material content, seem clearly within the disposal agency's broad discretion. Indeed, an examination of the purposes of the Act detailed in Section 2, *infra*, pp. 81-82, shows that these conditions are not only permitted but are almost compelled by the Act. Congress wanted to insure that the property would be put to its most effective use (see Section 2 (a), *infra*, p. 81) as rapidly and efficiently as possible (see Sections 2 (m) and 2 (r), *infra*, p. 82). The restriction against sale of the plane by a school while it was still useful for educational purposes is an effective means of carrying out those Congressional intentions. Moreover, the diversion of the plane from educational use would prevent the Government from obtaining the fair value of the plane as required by Section 2 (t), *infra*, p. 82, since the cash payment required from the school was only a part of the consideration to be received by the Government with the remainder being the benefits generally derived from use by educational institutions. See Section 13 (a) (1) (C), *infra*, p. 83. It is clear that the latter benefit will be received, as the Government expected in fixing the cash payment, only where the plane is used for educational purposes as long as so usable.

The statutory basis for the prohibitions against use for flight purposes and against sale of the plane by Vineland without first reducing it to its basic material content can be seen from the stated purposes in Sections 2 (h), 2 (j), 2 (m), and 2 (q),

infra, pp. 81–82. The nominal cash payment demanded from educational institutions acquiring planes for educational purposes (\$200 in the case here of a C-46A airplane worth at least \$5,000) would tend to convert educational institutions into mere conduits for speculators, contrary to Section 2 (h), *infra*, p. 81, unless stringent restrictions on the institution's ability to sell and use the plane were imposed. Moreover, absent those limitations, the school or one purchasing from it would be in a position to reap, contrary to Section 8 (q), *infra*, p. 82, unusual and excessive profits by selling the plane for commercial use. And, in view of the fact that over 11,000 planes were transferred to educational institutions, the policies announced in Sections 2 (j) and 2 (m) might well have been defeated if schools were permitted to sell the planes for nonscrap flight purposes, since dislocations of the domestic economy, international economic relations, the free market and competitive prices would likely result.¹⁷ That Congress did not intend ~~that~~ transfers to educational institutions to be merely an indirect means of disposing of surplus property into commercial channels—and this without regard to the limitations imposed in regard to direct commercial sales—is further indicated by Section 13 (a) (2) of the Act, which provides in part:

Surplus property shall be disposed of so as to afford
 * * * educational institutions * * * an opportunity to
 fulfill, in the public interest, *their legitimate needs*.

Plainly, disposals to educational institutions were to fulfill their needs alone, not the needs of others.

The court below cited Sections 2 (b), 2 (d), 2 (f), 2 (p), and 2 (s) of the Act (*infra*, pp. 81–82) as showing that Vineland's

¹⁷ Fear of competition from underpriced Government surplus was acutely felt by the aircraft industry as well as others. See RFC, Surplus Property News, p. 8 (October, 1945) :

The policies which govern the disposal of surplus aircraft have been worked out over a period of more than a year and a half after thorough and detailed consultation with all interested elements in the United States.

The Pague Committee report, on which those policies are largely based, declared that dumping of surplus aircraft regardless of price is not to be considered.

sale to the Finns was consistent with the purposes of the Act of aiding new small business concerns, assisting returning veterans, and furthering the transportation industry (R. 135). But, those purposes are pertinent to direct commercial sales by the Government, not to disposals to educational institutions, as to which, the objectives discussed *supra*, pp. 24–25, are relevant. Not only is there no suggestion in the Act that all of its twenty objectives are to be satisfied equally in every disposal, but it would be impossible to achieve such a goal since in many instances any attempt in that direction would result in an irreconcilable conflict. Consequently, far from imposing these objectives as mandatory requirements, Congress listed the objectives merely as “guides” to the disposal agency (see Section 9 (a), *infra*, p. 82; Section 13 (a), *infra*, p. 83), with the agency having the discretion of determining how best to achieve these “general objectives” (S. Rep. No. 1057, 78th Cong., 2d sess., p. 3) in a particular situation.

That Congress did not intend all the 20 objectives to be equally applicable to each disposal is also manifest when these objectives are examined against the other provisions of the Act. In several instances, a particular provision is plainly directed at implementing one specific objective. Thus, for example, Section 17 dealing with disposals in rural areas is directed at implementing the objective in Section 2 (e) (*infra*, p. 81) of fostering “family-type farming as the traditional and desirable pattern of American agriculture.” Similarly, subsections (b), (d), (f), (p) and (s), which the court below stressed are directed not to dispositions to educational institutions under Section 13, but rather to dispositions to veterans under Section 16, to small business under Section 18, and generally to private persons. In contrast, it should be noted that Section 13 (a) (1) (A) expressly deals with the disposition to educational institutions of “surplus property that is appropriate for school, classroom, or other educational use.” And there is no question but that the original disposal of surplus property to educational institutions furthers the objectives of the Act. This being the case, how can it be said that a continuing restriction on the use of the property for educational purposes, including purposes of research and experiment, vio-

lates, or is contrary to, the Act's objectives? The provisions of WAA Form 65 restricting the use and further disposition of aircraft merely constitutes the means employed by the disposal agency to assure the continued utilization of the aircraft for educational purposes.

Moreover, the purposes set forth in the Act were designed to be guides to the disposal agency, not to assist the educational institutions in selecting subsequent purchasers. Under the reasoning of the court below, the restrictions of WAA Form 65 would be valid and enforceable if, by chance, a school decides to sell a plane which the Government transferred to it, to a large established business operated by nonveterans, although they would be invalid, as the court ruled, if the school sells the plane to veterans seeking to establish their own business, as the Finns assert they are undertaking to do.¹⁸ Plainly, Congress did not expect the validity of the restrictions as originally imposed by the disposal agency to turn upon the nature of the school's subsequent sales of the property.

In these circumstances, there seems little question that the conditions relied upon by the Government in this action are wholly reasonable means of effecting the purposes of the Act.

2. *The legislative history demonstrates that Congress intended such restrictions.* Any doubt that the Surplus Property Act authorized the imposition of these restrictions is dissipated by the legislative history of the Act of 1944 and the subsequent congressional enactments in this field, which make it clear that Congress expected that transfers of surplus property be made upon such reservations and conditions. In debate on the House floor in regard to acceptance of the Conference Report concerning the 1944 Act, Representative Manasco, leader of

¹⁸ It is noteworthy that under its contract with the Finns, Vineland was to receive consideration valued at about \$21,000 (see *supra*, p. 7, fn. 4) for a plane for which Vineland had paid only \$200. Further, the Finns, under their lease arrangements with International, *supra*, p. 10, were to receive \$5,000 a month for an eighteen month lease of the plane or \$90,000. Certainly, such transactions are contrary to the Act's objectives of discouraging disposal of surplus property to speculators (Section 2 (h), *infra*, p. 81) and of preventing the making of unusual and excessive profits (Section 2 (t), *infra*, p. 82).

the House conferees, made it clear that schools receiving property at special reduced rates would be obliged to use it for educational purposes since that use constituted an important part of the consideration for the transfer.¹⁹ The Conference Report stated a like purpose with reference to the administration of educational disposals. H. Rep. No. 1890, 78th Cong., 2d Sess., p. 25.

In the Federal Property and Administrative Services Act of 1949 (63 Stat. 377, as amended, 40 U. S. C. 471), Congress made certain significant amendments to the surplus property disposal program. The power of the administrative agencies, however, was unchanged with regard to their authority to impose restrictions on transferee institutions in order to insure compliance with the purposes of the Act. Section 501 (40 U. S. C. 473), *infra*, p. 87, for example, stated that "all policies, procedures, and directives prescribed * * * by any officer of the Government under the authority of the Surplus Property Act of 1944 * * * shall remain in full force and effect unless and until superseded * * *." At the same time, the 1949 Act spelled out in somewhat greater detail the powers of the Administrative agency to impose and enforce those restrictions. Section 203 (k) (2) (A), 40 U. S. C. 484 (k) (2) (A), *infra*, p. 86, provides that the Federal Security Administrator has the authority "in the case of property transferred pursuant to the Surplus Property Act of 1944 * * * for school, classroom or other educational use * * *."

* * * (i) to determine and enforce compliance with the *terms, conditions, reservations, and restrictions* contained in any instrument by which such transfer was made;

¹⁹ Mr. VOORHIS of California. I wish the gentlemen would explain to the House what the provisions of the conference report on the disposal of property to schools and States and instrumentalities of States and subdivisions mean. I am not sure I understand that.

Mr. MANASCO. Under the terms of the conference agreement, these machines, tools, equipment, and so forth that are suitable for classroom use may be leased to the schools, taking into consideration the common good that accrues from that lease as part of the consideration.

Mr. VOORHIS of California. Does that mean that can be taken into account in determining what the terms of the lease or sale might be?

Mr. MANASCO. That is correct. [90 Cong. Rec. 7851]

(ii) to reform, correct, or amend any such instrument by the execution of a corrective, reformatory, or amendatory instrument where necessary to correct such instrument or to conform such transfer to the requirements of applicable law; and

(iii) to (I) grant releases from any of the *terms, conditions, reservations, and restrictions* contained in, and (II) convey, quitclaim, or release to the transferee or other eligible user any *right or interest reserved to the United States* by, any instrument by which such transfer was made, if he determines that the property so transferred, no longer serves the purpose for which it was transferred or that such release, conveyance, or quitclaim deed will not prevent accomplishment of the purpose for which such property was so transferred: *Provided*, That any such release, conveyance, or quitclaim deed may be granted on, or made subject to, such terms and conditions as he shall deem necessary to protect or advance the interests of the United States.²⁰

Congress thus clearly recognized that restrictions had been imposed on previous transfers and expressed approval.

In addition, in 1953 extensive hearings were held by the House Committee on Government Operations to examine

²⁰ As stated in the report of the House Committee on Expenditures in the Executive Department in regard to this provision (H. Rept. 670, 81st Cong., 1st sess., p. 15) :

* * * Under the Surplus Property Act of 1944, as amended, surplus property has been transferred to States and political subdivisions thereof, and to tax-supported or nonprofit educational and medical institutions for specified uses, subject to various conditions and reservations. This section would permit the head of the interested Government agency, subject to disapproval by the Administrator of General Services, to enforce compliance with such conditions or reservations, to reform or correct the instruments of transfer by which such condition or reservations are imposed, and to grant releases (including conveyances by quitclaim deed, in the case of real estate) from such conditions and reservations. Such releases are to be conditioned upon findings that the property no longer serves the purpose for which the transfer was made, or that release will not prevent accomplishment of the purpose of such transfer, and upon such other conditions as may be necessary to protect or advance the interests of the United States.

numerous complaints received that surplus property was being used for purposes contrary to those intended by Congress and, in some instances, in contravention of restrictions imposed by the disposal agencies. Throughout these hearings it was clear that the restrictions imposed by disposal agencies on subsequent use or sale were understood to have been authorized by Congress. See *Hearings before the House Committee on Government Operations on the Durable Surplus Property Program*, 83d Cong., 1st sess., *passim*, particularly pp. 76-103.

More recently, the Federal Property and Administrative Services Act of 1949 was amended by Public Law 61, 84th Cong., 1st sess. (H. R. 3322). Section 4 (a), *infra*, p. 88, of this new enactment provides:

* * * In the case of personal property donated or sold at a discount for educational, public health or memorial purposes, including research, under any provision of law enacted prior to the enactment of the Federal Property and Administrative Services Act of 1949, *no term, condition, reservation, or restriction imposed on the use of such property shall remain in effect after the date of the enactment of this Act. This subsection shall not be deemed to terminate any civil or criminal liability arising out of a violation of such a term, condition, reservation, or restriction* which occurred prior to the enactment of this Act, if a judicial proceeding to enforce such liability is pending at the time of, or commenced within one year after the enactment of this Act.

Here, again, Congress recognized the outstanding restrictions, and, though they were released for administrative reasons (H. Rep. No. 206, 84th Cong., 1st sess., p. 13),²¹ Congress expressly saved the Government's rights to enforce these restrictions in actions such as the instant proceeding. See H. Rep. No. 206,

²¹ "Section 4 (a) of the committee amendment is intended to facilitate and reduce administrative costs at the Federal, State, and institutional levels by removing the terms, conditions, reservations, or restrictions which were imposed pursuant to statutes enacted prior to the enactment of the Federal Property and Administrative Services Act of 1949. It has heretofore been necessary for donees to keep separate account for property depending upon which statute and which set of conditions attached thereto."

84th Cong., 1st sess., p. 13; S. Rep. 351, 84th Cong., 1st sess., p. 2. Surely, if Congress had believed these restrictions to have been originally without statutory basis, it would have stricken down all restrictions previously imposed, rather than allowing the Government a year within which to institute actions to enforce them. Indeed, considerable testimony was presented to the responsible committee that these restrictions were important to the protection of the goals of the educational disposal program. See *Hearings before the House Committee on Government Operations on H. R. 3322*, 84th Cong., 1st sess., pp. 58, 61, 67, 74, 100. This repealing provision of the Act was reported favorably on the sole ground that the outstanding restrictions imposed great administrative burdens upon federal and state agencies alike in insuring that the terms were obeyed. See H. Rep. No. 206, 84th Cong., 1st sess., p. 13; see, also, *Hearings before the House Committee on Government Operations on H. R. 3322*, *supra*, at pp. 20, 30, 31, 32, 35, 37, 314.

It is thus plain that Congress intended by the Surplus Property Act of 1944 to sanction restrictions of the type here involved in connection with transfers to educational institutions and to make these restrictions enforceable, as the Government has sought to do in the instant case. Therefore, the court below erred in ruling that the restrictions of WAA Form 65, as well as the less stringent restrictions of WAA Regulation No. 4 (see, *infra*, pp. 33-34), were inconsistent with, and so invalid under, the Surplus Property Act of 1944.

B. War Assets Administration Regulation No. 4 authorized the restrictions in WAA Form 65

Section 5 (a) of the Surplus Property Act of 1944 originally provided for a Surplus Property Board to administer the Act. 58 Stat. 765, 768. However, prior to any of the events significant in this case, the Surplus Property Board was abolished and its functions were transferred first to the Surplus Property Administration (59 Stat. 533) and thereafter to the War Assets Administration. Ex. Order No. 9689, 11 Fed. Reg. 1265; Ex. Order 9709, 11 Fed. Reg. 3149. In exercising the authority to issue regulations for the disposal of surplus aeronautical property, vested in it by Sections 9 (a) and 13 (a) of the Act,

the War Assets Administration issued its Regulation 4 (11 Fed. Reg. 5868, 32 C. F. R. (1946 Supp.) 8304.1 *et seq.*). Section 8304.11 of this regulation (11 Fed. Reg. 5870) dealt with "disposals for educational and public health purposes."

Since the transfer of the plane to Vineland here involved was made pursuant to WAA Form 65, a form also issued by the War Assets Administration, it is important to note at the outset that the holding of the court below that the restrictions contained in WAA Form 65 are contrary to the provisions of Regulation 4 in effect overrides the consistent construction of the administrative agency which issued both Regulation 4 and Form 65.²² In so ruling, the court below failed to follow established principles in this area. As stated by the Supreme Court in *Bowles v. Seminole Rock & Sand Co.*, 325 U. S. 410, in regard to this very matter (325 U. S. at 413-414):

* * * Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation. The legality of the result reached by this process, of course, is quite a different matter. In this case the only prob-

²² In addition to WAA Form 65 itself, which shows the understanding of the War Assets Administration as to the bounds set by its Regulation 4, the administrative interpretation is revealed in letters from the administrative agencies ((Plaintiff's Exhibits 14 and 15; Vineland's Exhibit E; Finns' Exhibits K-7, K-9, K-22), the testimony of the former Chief of the Compliance Section of the Surplus Property Utilization Division of the Federal Security Agency (R. 686-87, 690-94, 697-699, 702-04, 717, 741, 760-64, 779, 790-91, 803), and the testimony of the present Chief of the Surplus Property Branch of the Office of the General Counsel for the Department of Health, Education and Welfare (R. 822-25, 830, 844, 852-53), all of which clearly shows that the agencies charged with the administration of this program consistently believed that the terms of WAA Form 65 were valid and consistent with Regulation 4.

lem is to discover the meaning of certain portions of Maximum Price Regulation No. 188. Our only tools, therefore, are the plain words of the regulation and any relevant interpretations of the Administrator.

And, as noted, by this Court, where the interpretations by an administrative agency of its own regulation are "not irrational, its interpretations are binding upon the courts." *Porter v. Crawford & Doherty Foundry Co.*, 154 F. 2d 431, 433 (C. A. 9), certiorari denied, 329 U. S. 720, and cases there cited; see, also, *Mechanical Farm Equipment Distributors, Inc. v. Porter*, 156 F. 2d 296, 297-298 (C. A. 9), certiorari denied, 329 U. S. 771; *Bowles v. Wheeler*, 152 F. 2d 34, 41 (C. A. 9). In the instant case, the interpretation of Regulation 4 embodied by War Assets Administration in its Form 65 is far from "plainly erroneous or inconsistent" with the regulation, let alone "irrational."

Under Section 8304.11, the provision of Regulation 4 dealing with disposals to educational institutions, the disposal agency, subject to the approval of the War Assets Administration, was empowered in subsection (a), *infra*, p. 93, to determine which items were available for delivery to educational institutions, to fix prices which would reflect the benefit that may accrue to the United States from the use of such property for educational purposes, and to dispose of that property to educational institutions at the prices so approved. Section 8304.11 then goes on in subsection (b), *infra*, p. 93, to instruct the disposal agency to "establish procedures pursuant to which educational or public-health institutions or instrumentalities may make written application for surplus aeronautical property available for disposal to such institutions or instrumentalities." The broad discretion thus given to the disposal agency to define the terms and conditions on which it would dispose of surplus property was limited only by the further requirements set out in Section 8304.11 (b) that:

* * * Such procedures *shall include* (1) certification that the applicant is an educational or public-health institution or instrumentality as defined in Section 8304.1, (2) a certification of the purposes for which the property

is to be acquired, and in the case of aircraft an agreement that it will not be flown except for purposes of research or experiment in connection with the science of aeronautics, and (3) an agreement that the property will not be resold to others within three (3) years of the date of purchase without the consent in writing of the disposal agency unless it is mutilated or otherwise rendered unfit for use except as scrap.²³

The court below held the restrictions contained in WAA Form 65 invalid under these provisions of the regulation because, according to the court, the restrictions "are contradictory and cannot stand together" (R. 133-134, see also R. 156-157). The court noted (R. 133):

Thus Form 65, as executed, prohibits entirely all flight use, whereas subsection (2) of the applicable regulation then permitted both research and experimental flight. Moreover the restrictions as to disposal contained in Form 65 are without limit in point of time, whereas subsection (3) of the amended regulation limits restrictions upon disposal to the period of three years next following purchase.

However, while it is true that the conditions required by Regulation 4 are less stringent than those imposed by WAA Form 65, this does not mean that the WAA Form 65 restrictions were contradictory to those of Regulation 4. There is no doubt that the Regulation's requirements are fully embraced within the terms of WAA Form 65; the difficulty encountered by the court below, accordingly, was not that WAA Form 65 imposed less restrictions than Regulation 4, but rather that it imposed more.

Far from contradicting Regulation 4, the more stringent restrictions of Form 65 were clearly contemplated by the regulation. Unlike the earlier regulations referred to by the court

²³ Section 8304.1 (b) (4) of the Regulation (11 Fed. Reg. 5868, 32 C. F. R. 8304.1 (b) (4) (1946 Supp.)) defines "Scrap" as "property that has no reasonable prospect of sale except for its basic material content." See also, *infra*, pp. 54-55.

below (R. 133), which prescribed the restrictions to be imposed in connection with such transfers and appear to permit no deviation,²⁴ the regulation here, as already indicated, *supra*, p. 33, left to the disposal agency broad discretion in establishing procedures for the disposal of surplus aircraft to educational institutions. The regulation set out certain conditions which the disposal agency "shall include" and while it was mandatory in the sense that it required at least these conditions, it imposed no restriction on the agency's authority to require such further and additional conditions as it deemed necessary or desirable. Thus, the regulation was not intended to set forth *all* the conditions or terms under which the transfers were to be made. This was left to the disposal agency which has the power to insert whatever conditions it deems appropriate, subject only to the minimum conditions which the regulation required that the disposal agency "shall include." Cf. *Gilbert & Secor v. United States*, 8 Wall (75

²⁴The regulation appearing in 10 Fed. Reg. 5460 referred to by the court below (R. 133) provided:

SEC. 8304.4 (c). The buyer shall file with the disposal agency a certificate under oath duly notarized that such buyer is an educational institution as defined in Sec. 8304.1 (e), that the property is being acquired to be used only for non-flight instructional, research, or experimental purposes, that it will not be used for any flight purposes, and that the property will be disposed of only as scrap and then only after it shall have been rendered completely unfit and useless except for its basic material content.

The regulation published in 10 Fed. Reg. 10362, also cited by the court below (R. 133), stated:

SEC. 8304.4 (c). The buyer shall file with the disposal agency a certificate under oath duly notarized that such buyer is an educational institution as defined in Sec. 8304.1 (e) or a State or local government as defined in Sec. 8304.1 (i), that the property is being acquired to be used only for non-flight instructional, research, experimental, or memorial purposes, that it will not be used for any flight purposes and that the property will be disposed of only as scrap and then only after it shall have been rendered completely unfit and useless except for its basic material content.

In this connection, it may be noted that the conditions in WAA Form 65 differ materially from those contained in these earlier regulations, which were implemented by an earlier form (Form No. SWPD-DP-35, Finns' Exhibit B) setting forth in *haec verba* the conditions required by these regulations.

U. S.) 358, 359;²⁵ *United States v. Linn*, 15 Pet. (40 U. S.) 290; *American Smelting Co. v. United States*, 259 U. S. 75; *Lomax Transportation Co. v. United States*, 183 F. 2d 331 (C. A. 9); *United States v. B. & O. R. R.*, Fed. Cas. No. 14510 (D. W. Va.). The minimum conditions of sale incorporated in the regulation are for the protection of the Government, not the educational institution to which the plane is transferred, and do not preclude the disposal agency from requiring terms that are more favorable to the Government or designed more effectively to assure compliance with the educational purposes intended to be served by the transfer. In these circumstances, it appears plain that the conditions of WAA Form 65 are not "irrational" nor "plainly erroneous or inconsistent" with Regulation 4 and hence there is no warrant for the ruling below that the WAA Form 65 conditions cannot stand.

C. WAA Form 65 operated to retain a proprietary interest to the plane, entitling the Government to possession of the plane upon Vineland's breach of the conditions

The court below ruled that even if the conditions of WAA Form 65 are valid—and we have demonstrated, *supra*, pp. 22–36, that they are—the Government had conveyed title to Vineland so that the Government is not entitled to possession of the plane upon Vineland's breach of the conditions (R. 127–130). Examination of the provisions of WAA Form 65 and the context in which the transfer was made reveals, we believe, that

²⁵ In *Gilbert & Secor* an Act of Congress had directed the Secretary of the Navy to enter into a contract for the construction of a dock either with the plaintiff or another company, specifying that the

* * * contracts could be made at prices that should not exceed by ten per cent the prices which have been submitted by either of said parties. * * *

Since the plaintiff had offered to build the dock for \$732,905, the Secretary of the Navy could have contracted to have the dock constructed for ten per cent (\$73,290.50) more. Plaintiff signed a contract calling for the smaller sum but subsequently brought suit for an additional amount. In rejecting plaintiff's claim that the statute was "itself an acceptance of certain proposals made by plaintiffs," the Supreme Court commented (8 Wall. at 361):

* * * Did Congress mean to say, we accept your proposal, and give you ten per cent more than you have asked? Or did it mean to authorize the secretary to make the best terms he could, not exceeding that limit? Clearly it must have intended the latter.

WAA Form 65 was intended to retain for the Government the right to repossess the aircraft upon a breach of the conditions imposed. Like many commercial transactions, the transfer may fall into one or more of various categories of legal relationships such as bailment, trust or determinable fee. Whatever category applies, the Government, we submit, had title and right to possession of the plane upon Vineland's breach of the conditions in WAA Form 65.²⁶

1. *Full title not passed to Vineland.* The holding below that the Government intended to pass full unencumbered title to Vineland is negated by the requirement of section 13 (a) (1) (C) of the Surplus Property Act of 1944, *infra*, p. 83, that the educational utilization of surplus property be treated as part payment therefor, by the necessity of attaining the objectives of Section 2 of the Act, *infra*, pp. 81-82, by the authority vested in the disposal agency by Section 15 of the Act to dispose of property upon such terms and conditions as the agency deems proper, by the inadequacy of the \$200 cash consideration for the plane if for full legal title, and by the restrictions on use and alienation of the plane contained in the regulation and WAA Form 65. This conclusion is further buttressed by the negotiations leading up to the delivery of the plane and the actions of the parties thereafter which plainly manifest an understanding that the Government did not transfer "all its right, title and interest in the plane."

²⁶ In *United States v. School District No. 2*, 124 F. Supp. 570 (E. D. Mich.), pending on appeal, C. A. 6, No. 12423, the District Court found it "unnecessary to characterize the exact nature of the rights which the respective parties had in the surplus plane" since "[i]t is at least clear that the parties were aware at all times that the United States retained an interest in the aircraft" (124 F. Supp. at 573).

Indeed, recovery here could be predicated upon the Government's right to rescind the contract since violation of the crucial terms of WAA Form 65 was a substantial material breach. See *Restatement, Contracts*, secs. 317, 347. Moreover, one of those terms, the continued use of the plane for educational purposes, also represented a major portion of the consideration, so Vineland's premature sale established a right of rescission for failure of consideration. The right of rescission also defeats any claim by the Finns or International, since they took with notice of the contract terms. In the terminology of the *Restatement*, their possession was subject to a constructive trust in favor of the equitable owner, the United States. See *Restatement, Restitution*, sec. 175.

War Assets Administration Regulation 4 did not require that the disposal agency transfer all of the Government's interests in the airplane in suit to Vineland. See *supra*, pp. 33-36. Section 8304.11 (a) of Regulation 4, in conferring authority on disposal agencies to make disposals for educational purposes, carefully uses the term "disposal" and "to dispose" rather than the terms "sale" or "to sell." This is in marked contrast to other sections of the omnibus Regulation 4 relating to disposals into commercial channels. See, for example, Sections 8304.7,²⁷ 8304.8, 8304.9 (c). Furthermore, Section 8304.11 of the regulation, containing, as it does, the restrictions which a disposal agency must impose on the alienation and use of aircraft disposed of thereunder, is not consistent with an intent to provide for the transfer of the full title to the aircraft. Such restrictions do not conform with the traditional concept that the ownership of personal property implies the right to use and dispose of it freely.

The document which spells out in greatest detail the relationship between the Government and Vineland, WAA Form 65, not only falls far short of suggesting that full unrestricted title to the plane was thereby transferred to Vineland but, on the contrary, contains, as does Regulation 4, express restrictions on use and further disposition which are incompatible with an intent to transfer full title. Under the provisions of Form WAA 65, Vineland could acquire the plane only for its

²⁷ As supporting its conclusion that full title was intended to be transferred to Vineland, the court below relied upon the proviso in Section 8304.7 of the regulation (11 Fed. Reg. 5870, 32 C. F. R. 8304.7 (1946 Supp.)), *infra* p. 92) that "after June 30, 1946, transport aircraft shall be disposed of only by sale." (R. 129.) However, an examination of the complete text of Section 8304.7 shows that it has no bearing on the instant transaction between the Government and Vineland. This section is designed to deal with the disposal of transport aircraft for flight purposes at prices which reflect the "potential earning power of the aircraft in relation to other models, its estimated economical life in scheduled and nonscheduled commercial service, the degree of modification required for conversion to civilian use and the relation between supply and demand." Although the airplane in suit might have been disposed of as a "transport aircraft," *i. e.*, for flight purposes, it was in fact disposed of under the educational program for educational purposes, a disposal governed by Section 8304.11, rather than Section 8304.7 with the price thereof fixed in accordance with Section 8304.54 *infra* p. 95.

own "sole use" (Par. 2; R. 15) and could use it only for restricted nonflight purposes, "Instruction, Research, Experiment" (Par. 2; R. 15). The plane could not be flown (Par. 2, 6; R. 15), it could not be used for commercial purposes of any kind (Par. 2; R. 15), it could not be sold within the first three years of Vineland's possession without prior written approval from the Government (Par. 7; R. 15), it could not be sold at any time if it was still serviceable for educational purposes (Par. 7; R. 15), and it could not be sold at any time without first being reduced to its basic material content (Par. 7; R. 15-16).

In addition to these reservations expressly placed on the transfer, Vineland's lack of an unencumbered title is evidenced by the fact that no bill of sale or certificate of title was given to Vineland (R. 125, 228-230); instead, Vineland acknowledged receipt of the plane on a "Release of Custody" form issued by the contractor who was storing the plane for the Government (Plaintiff's Exhibit 4), which form carries the typewritten legend "This aircraft was sold for educational use only." And so, we submit, the original papers describing the transfer do not contain any basis for a suggestion that the transfer was an absolute or unconditional conveyance of the Government's interest in the plane.

Also indicating that full title to the plane was not passed to Vineland is the fact that the total cash payment made by Vineland was the nominal amount of \$200. Since at the same time the Government was selling similar planes to ordinary purchasers for \$5,000—and the advisory jury and the district court found that to be the value of the plane at that time (R. 116, 150)—it would be unreasonable to assume, as the holding below of necessity does, that the Government was willing to convey its entire interest in the plane to educational institutions for only \$200. If such were the case, the institution would be in a position not only to resell the plane contrary to the purpose of the Act for unusual and excessive profits, as is appellees' claim here, but also to defeat the very purpose for which the plane was transferred to it, *i. e.*, educational purposes. And since the nominal consideration of \$200 was to be supplemented by the benefits from the

intended educational use,²⁸ it would seem clear that to achieve these purposes, the disposal agency would have to retain an effective control over the institution's use and disposition of the plane. Consequently, remembering that the disposal agency's primary interest was the achieving of the Act's purposes, rather than receiving damages for violation thereof, there should be little doubt that the restrictions imposed upon educational institutions, in connection with the transfers to them were proprietary, rather than contractual in nature. Only as a proprietary interest, entitling the Government to recovery of the plane upon breach of the restrictions, could these restrictions operate effectively in the discharge of this function of assuring that the property transferred was not improperly diverted from educational use to obtain excessive profits.

Finally, in interpreting this transfer of Government property it should be remembered that "any ambiguity in a grant is to be resolved favorably to a sovereign grantor—nothing passes but what is conveyed in clear and explicit language" (see *Great Northern Ry. v. United States*, 315 U. S. 262, 272), with "inferences being resolved not against but for the Government." See *Caldwell v. United States*, 250 U. S. 14, 20; see also *Wisconsin C. R. R. v. United States*, 164 U. S. 190, 202; *United States v. Michigan*, 190 U. S. 379, 401.²⁹

The district court placed considerable stress on the fact that words such as "price," "sell," "sold," and "purchase" were

²⁸ In the Conference Report leading to the Surplus Property Act of 1944, the Committee stated that the provision for low-price sales to educational institutions "simply has the effect of treating the benefit so accruing to the United States as a medium of payment." See H. Rep. No. 1890, 78th Cong., 2d sess., p. 25. See, also, *supra*, p. 28.

²⁹ In this connection, it should be noted that considerations of public policy which, as the District Court noted (R. 130), have caused courts to strike down or avoid unreasonable restraints on alienation have no bearing on transfers authorized by Congress. It would be incongruous indeed for a constitutional act of Congress, which itself determines public policy, to be treated as against public policy. Moreover, contrary to the view expressed by the court below, the restraints imposed by WAA Form 65 would not be unreasonable, even if established by a private individual, since they serve to enforce the purpose of the transfer (*i. e.*, educational use). See *American Law of Property*, Sec. 26.28 (1954 ed.); *Restatement, Property*, Sec. 406, Comment i.

used in various documents, other than WAA Form 65, which described the transfer to Vineland (R. 128–129). However, these words are, of themselves, inconclusive as to the nature of the transfer. They do not necessarily require that full title be passed and consequently do not preclude the retention of an interest on the basis of which the property may be recovered upon breach of the valid restrictions. See *Williston on Sales*, Secs. 7, 8 (1948 ed.). Moreover, to the extent they have the meaning of full and unencumbered transfer of title, attributed to them by the court below, that meaning is negated by the explicit terms of the documents which were intended to control the transfer. WAA Form 65 refers to the transaction as merely a “transfer” under which Vineland would “acquire” aeronautical property (R. 14–16). And, although the Release of Custody Form (Plaintiff’s Exhibit 4) uses the words “purchaser” and “sold,” it purports only to release custody of the aircraft to Vineland’s representative and carries the added notation that “[t]his aircraft was sold for educational purposes only.” And if, as the court below ruled, the parties intended Vineland to receive full title to the plane, it is interesting to speculate why no bill of sale or certificate of title was ever issued to Vineland.

Furthermore, Vineland understood that it had not received full and unencumbered title and was acutely sensitive of the limitations on its power to convey. In the notice for bids which culminated in the sale to the Finns, Vineland stated that the plane was “subject to certain restrictions on the use thereof” (R. 57) and advised that before there could be a sale “the successful bidder will be required to secure the necessary releases to said restrictions from the proper governmental agency of the United States” (R. 58). The same provisions were included in the Contract for Sale to the Finns (R. 62–64). In addition, Vineland, in corresponding with various agencies in regard to surplus aircraft, acknowledged the Government’s power to prevent a sale or exchange of the plane on at least one occasion (Plaintiff’s Exhibit 18).

The Finns also recognized that the Government retained the right to block the sale of the plane and to insist that it be used in a specific manner; one of them travelled all the way from California to Washington, D. C., and strenuously sought in

numerous conferences with Government officials to obtain a release of those restrictions and governmental consent to the sale. Although the testimony in the record is conflicting, there is evidence that the Finns offered to pay the Government \$2,000 or \$3,000 for such a release (R. 687, but see R. 456). Likewise, the Government agencies charged with supervision of these transfers to educational institutions consistently advised that the Government retained a property interest and insisted on compliance with the terms of WAA Form 65 (R. 686, 824, 871; Plaintiff's Exhibit 15; Finn's Exhibits K-7, K-8, K-9, K-10).

Thus, when viewed in context, it seems quite clear that the effect of the WAA Form 65 was to retain a proprietary interest in the plane transferred to Vineland for specific limited purposes, the breach of which entitled the Government to recover possession of the plane. And while we believe it unnecessary to the disposition of this case to fit the Government's arrangements with Vineland within a specific category of legal relationships, these arrangements had certain characteristics common to certain well defined legal categories. It is to those that we now turn.

2. *Bailment*. The transaction between the Government and Vineland has all the usual characteristics of a bailment by the United States to Vineland as the bailee for so long as the plane was used for educational purposes. Not only was there authority to bail the plane,³⁰ but the transaction clearly comes within the classic definition of a bailment, *i. e.*, the delivery of possession of goods for a specified purpose to be redelivered to the bailor or otherwise dealt with according to his directions after that purpose had been fulfilled. Cf. *Firestone Tire and Rubber Co. v. Cross*, 17 F. 2d 417, 418 (C. A. 4); *Breeden et ux. v. Elliott Bros.*, 173 Tenn. 382, 385, 118 S. W. 2d 219, 220; *Black's Law Dictionary*, p. 184 (3d ed. 1933). Paragraph 7 of the WAA Form 65 provides for a specific method of disposition of the aircraft when the purpose of the bailment has been

³⁰ Section 13 (a) (1) (A) of the Surplus Property Act of 1944, specifically authorized the "leasing" of surplus property to educational institutions (see *supra*, p. 22). The word "lease" when applied to personal property generally refers to the relationship of bailor and bailee. See 8 C. J. S., *Bailments*, p. 226.

fulfilled, *i. e.*, when, in the language of the Form, the plane becomes "unfit" for the purpose for which it was acquired.

Moreover, it is, of course, the manifested intention of the bailor, not the use of any special formula of language, which causes the creation of a bailment. See *Commissioner v. San Carlos Milling Co.*, 63 F. 2d 153, 154 (C. A. 9). Here, that intent can be found in the refusal to give a bill of sale or certificate of title combined with the strict conditions on use and sale which appear in Regulation 4 and WAA Form 65. (See *supra*, pp. 38-39). When, in addition, it is noted that neither the regulation nor the Form used language clearly designed to effectuate a transfer of title and that the Agreement gave Vineland no power of disposition of the aircraft except under the conditions and in the manner specified in paragraph 7, it becomes clear that there existed in the transfer all of the elements ordinarily necessary to create a bailment: the delivery of personal property for a specific purpose and the retention by the bailor of the right to control the disposition of the property after the purpose had been fulfilled.

In the instant case the bailment came to an end when, in October 1951, Vineland ceased to use the plane for educational purposes (R. 267). From that time on the Government had the right to repossess the plane for whatever purpose it desired. Moreover, even before Vineland discontinued its use of the plane, its attempted transfer of title to the Finns—whether effective, as the court below held in its Memorandum Opinion (R. 130), or not (see, *infra*, pp. 67-70)—violated the terms of the bailment, thereby terminating Vineland's interest in the plane and entitling the Government to maintain an action for conversion against Vineland or the Finns. *Coy v. E. F. Hutton & Co.*, 44 Cal. App. 2d 386, 112 P. 2d 639; *Knowles v. Smith*, 190 Mich. 409, 157 N. W. 276; *Buckmaster v. Mower*, 21 Vt. 204. From another point of view, the Government as bailor had the right to terminate the bailment and retake possession of the plane when Vineland permitted the property to be used for flight purposes contrary to the express conditions of the bailment to Vineland. *Trotter v. Union Indemnity Co.*, 35 F. 2d 104 (C. A. 9); *Baxter v. Woodward*, 191 Mich. 379, 158 N. W. 137; *Carstensen v. Gottesburen*, 215

Cal. 258, 9 P. 2d 831; *Burnett v. Edward J. Dunnigan, Inc.*, 165 Wash. 164, 4 P. 2d 829; Cal. Civil Code, Sec. 1931.

3. *Trust.* The relationship between the Government and Vineland also fits into that of a trust, with Vineland being the trustee of the plane. The avowed purpose of this disposal program strongly supports such a construction, especially in view of the public policy favoring educational trusts and the consequent judicial rule of construction that instruments should be liberally construed to support such trusts. See Bogert, *Trusts and Trustees*, Vol. 2A, Sec. 361 (1953 ed.). The courts have commonly construed transfers of this nature between governmental units as creating trusts, since the intended purpose was clear and express. Limitations on use or redispisal were not deemed as necessary as they might be in an arm's length transaction between private parties. See, *e. g.*, *United States v. Michigan*, 190 U. S. 379; ³¹ *Wyoming Agricul-*

³¹ In *United States v. Michigan*, *supra*, an act of Congress had granted certain public lands to the State of Michigan for the purpose of aiding the State in the construction and operation of a canal. Some of the land so granted was as a right of way for the canal, while other land was expressly made subject to the disposal of the State legislature for the above purposes. Although the statute contained no technical trust language, the Supreme Court held that the State held the land in trust and had the duty to account to the United States for money received from the sale of certain portions of the land:

Whether, under these circumstances, technical words were used to express the thought that the State was to be a trustee, is not important if, upon a reading of the statutes and a survey of the condition of the country when the acts were passed, it is apparent that the intent was that the State should occupy the position of trustee in the construction and operation of the canal. (190 U. S. 396.)

An examination of the act of Congress of 1852, set forth in the foregoing statement of facts, will show, as we think, the trust character of the transaction between the United States and the State. There is granted to the State, by section one, the right of locating a canal through the public lands of the United States 400 feet in width, but this right of way is by the terms of the act to be used by the State, or under its authority for the construction or convenience of such canal and the appurtenances thereto, and the use thereof is thereby vested in the State forever, but "for the purposes aforesaid and no other." * * * The act does not grant an absolute estate in fee simple in the land covered by this right of way. It was in effect a grant upon condition for a special purpose; that is, in trust for use for the purposes of a canal, and for no other. The State had no power to alien it and none to put it to any other use or purposes. Such a grant creates a trust, at least by implication (190 U. S. at 398).

tural College v. Irvine, 206 U. S. 278; *Ervien v. United States*, 251 U. S. 41; *Fenn v. Kinsey*, 45 Mich. 446, 8 N. W. 64. The restrictive conditions on Vineland's possession and power to sell the plane lend themselves to being treated as instructions to the trustee set forth as part of the transfer. As in the case of a bailment, violation of the terms of the transfer by Vineland as trustee would authorize the Government to retake title and possession of the plane. See *Restatement, Trusts*, Sec. 333, 334; cf. *Hopkins v. Grimshaw*, 165 U. S. 342; *Shoemaker v. American Security & Trust Co.*, 163 F. 2d 585 (C. A. D. C.). And this could be enforced against the Finns as well, since they had notice of the terms of the transfer to the school and the infirmities of Vineland's title. See *Restatement, Trusts*, Secs. 288, 291.

4. *Determinable fee*. Finally, we believe that the Government's transfer to Vineland may be regarded as a transfer of title subject to reverter to the United States upon breach of the conditions specified in WAA Form 65. This not only would be consistent with the language of sale stressed by the court below (R. 128-129, *supra*, pp. 40-41), but also would give effect to the limited purpose of educational use for which the transfer was made. Under this construction Vineland would have obtained a determinable fee interest in the plane, which, although not common for personal property, has been recognized by the courts on numerous occasions. See, *e. g.*, *Hale v. Finch*, 104 U. S. 261; *Boal v. Metropolitan Museum of Art*, 298 Fed. 894 (C. A. 2); *National Metropolitan Bank v. United States*, 111 F. Supp. 422 (Ct. Cls.). In *Northern Pacific Ry. v. Townsend*, 190 U. S. 267, the Supreme Court construed the grant of a railroad right of way as the conveyance of a determinable fee subject to reverter for violation of the conditions of the transfer (190 U. S. at 271):

* * * But, although there was a present grant it was yet subject to conditions expressly stated in the act, and * * * to those necessarily implied, such as that the road shall be used for the purposes designed. Manifestly, the land forming the right of way was not granted with the intent that it might be absolutely disposed of at the volition of the company. On the

contrary, the grant was explicitly stated to be for a designated purpose, one which negated the existence of the power to voluntarily alienate the right of way or any portion thereof. The substantial consideration inducing the grant was the perpetual use of the land for the legitimate purposes of the railroad, just as though the land had been conveyed in terms to have and to hold the same so long as it was used for the railroad right of way. In effect the grant was of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted. * * *

See also *Hale v. Finch*, 104 U. S. 261; *Gamble v. Gates*, 92 Mich. 510, 52 N. W. 941.

The *Northern Pacific* case provides strong, if not compelling, authority for reading the Government's transfer of the plane to Vineland as constituting a grant of "a limited fee, made on an implied condition of reverter in the event the [grantee] ceased to use or retain the [property] for the purpose for which it was granted." As here, the grant in *Northern Pacific* appeared to be in terms of a transfer of title (see 190 U. S. at 271). However, both in *Northern Pacific* and here, the transfer was for a specific limited purpose; in *Northern Pacific*, the purpose was "the construction of a railroad and telegraph as proposed" (190 U. S. at 268) and here the transfer was for the sole use of a tax-supported educational institution for the purpose of non-flight instructional. Surely, this expressed purpose for the transfer, particularly when coupled with the specific restriction on further disposition, in the language of the *Northern Pacific* case, "negated the existence of the power to voluntarily alienate" the airplane before it became unfit for such educational use or in a manner other than that specified in the Agreement.

Moreover, paralleling the fact that in *Northern Pacific* the substantial consideration for the grant was "the perpetual use of the land for the legitimate purposes of the railroad" (190 U. S. at 271), is the fact here that the substantial consideration for the Government's transfer of the airplane to Vineland was the continued educational use of the plane to

meet the legitimate needs of the recipient educational institution so long as the aircraft was fit for such use. This factor is of particular significance here for, as already discussed, Section 13 (a) (1) (C) of the Surplus Property Act of 1944, *infra*, p. 83, required the War Assets Administration to treat the benefits from educational use of the airplane as part of the payment for it, and it was on this basis that the War Assets Administration charged Vineland only \$200 for the airplane when its fair market value at the time was at least \$5,000. In view of the virtual identity of the controlling facts, we believe to be fully applicable here the holding in *Northern Pacific* that, despite the absence of an express reservation of a right of reverter in the Government, "[i]n effect the grant was of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted" (190 U. S. at 271).³²

With such a right of reverter in the Government, it follows from the very nature of the Government's right that upon breaches of the conditions of the determinable fee, such as those committed by Vineland here, title to the plane reverted to the Government and so the Government was entitled to immediate possession thereof. See cases cited in fn. 32, p. 47.

D. Appellees are estopped to deny that the terms of WAA Form 65 are valid or to deny that a breach of the terms entitles the Government to retake the plane

When the Government transferred the plane to Vineland, it was clear that the disposal agency considered the terms of WAA Form 65 to be consistent with the Act and the regulation, and interpreted the Agreement as providing for the reten-

³² It is settled that no particular formula need be used to bring about the retention of a right of reverter in the grantor, and, indeed, that no express retention of a right of reverter is necessary. See, e. g., *Staack v. Detterding*, 182 Iowa 582, 161 N. W. 44; *School District No. 5 v. Everett*, 52 Mich. 314, 17 N. W. 926; *Board of Education v. Edison*, 18 Ohio St. 221; *Meade v. Ballard*, 7 Wall. (74 U. S.) 290; *Leonard v. Burr*, 18 N. Y. 96. The *Restatement* suggests that disproportionately low consideration from the grantee and a dedication to use important to the grantor, both present in this case, indicate the retention of a right of reverter. See *Restatement, Property*, sec. 45, com. p.

tion by the Government of a property interest in planes transferred under this program. See *supra*, pp. 6, 9, 32, 42. Assuming, *arguendo*, that the court below was correct in ruling that the Government retained only contractual rights (R. 130), Vineland is nevertheless estopped to deny that the Government retained a property interest. The disposal agency made the transfer on the basis of this understanding, as Vineland well knew (see *supra*, pp. 5-7), so that all the elements of a common law estoppel situation are present. See Pomeroy, *Equity Jurisprudence*, Sec. 805 (4th ed. 1918). Moreover, in view of Vineland's knowledge of the disposal agency's understanding as to the effect of WAA Form 65, it would seem, under well-settled principles, that the understanding became part of the agreement, equally binding and effective upon both parties thereto. *Holbrook v. Petrol Corp.*, 111 F. 2d 967 (C. A. 9); *Pacific Portland Cement Co. v. Food Mach. & Chem. Corp.*, 178 F. 2d 541 (C. A. 9). Finally, Vineland acquiesced in this administrative interpretation for more than 4 years; we submit that this long period of acquiescence constitutes an acceptance by Vineland of the terms as understood by the administrative agency. Cf. *Fitzpatrick v. Flannagan*, 106 U. S. 648; *Miller v. Continental Shipbuilding Corp.*, 265 Fed. 158 (C. A. 2); *Monad Engineering Co. v. United States*, 53 Ct. Cls. 179; *City of Reading v. Rae*, 106 F. 2d 458 (C. A. 3), certiorari denied, 308 U. S. 607. Since the Finns were not bona fide purchasers, their rights are no greater than Vineland's, and they also are barred by Vineland's acceptance of the plane without protest as to the conditions and by Vineland's long period of acquiescence. Cf. *Stacy v. Thrasher*, 47 U. S. 44, 59.

Likewise, both Vineland and the Finns are precluded from contending that the provisions of WAA Form 65 are invalid. If, as the district court concluded, Vineland was entitled to more beneficial terms under the statute and the regulations that it was accorded under the contract, it has waived its right to insist on those terms. Cf. *Shutte v. Thompson*, 15 Wall. (82 U. S.) 151. In the very field of Government contracts for the acquisition or disposal of property, the courts have repeatedly held contractors bound to the prices set by their contracts even though they could have rejected the contracts and insisted on

a better price under a statute or regulation. *American Smelting & Refining Co. v. United States*, 259 U. S. 75; *Matson Navigation Co. v. United States*, 284 U. S. 352; *St. Louis Hay & Grain Co. v. United States*, 191 U. S. 159; *Parish v. United States*, 8 Wall. (75 U. S.) 489, 490; cf. *Gray v. Commodity Credit Corp.*, 159 F. 2d 243 (C. A. 9), certiorari denied, 331 U. S. 842; see also, cases cited *supra*, pp. 35-36. Moreover, just as a party may not accept benefits conferred by a statute and at the same time attack the validity of the conditions imposed by the legislature (*e. g.*, *Fahey v. Mallonee*, 332 U. S. 245, 255; *United States v. City and County of San Francisco*, 310 U. S. 16, 29), defendants should not be permitted to enjoy the benefits of the agency's administrative decision to allot the plane to Vineland and attack the validity of the conditions imposed by the agency. Cf. *Callanan Road Co. v. United States*, 345 U. S. 507, 513. In formal terms, the vice of the ruling below is that the claim by Vineland (and derivatively by the Finns) that Vineland acquired title to the plane from the Government is predicated on the very document which the district court found to be invalid, and it is settled that a party may not at the same time "claim both under and against the same deed." See *Gibson v. Lyon*, 115 U. S. 439, 447. If, as the court below concluded, the disposal agency was without authority to make transfers under the terms set out in WAA Form 65, the logical result of that decision is that the transfer was void and neither Vineland nor the Finns ever acquired any interest in the plane, a result which defendants obviously would not wish to accept.

From another viewpoint, a ruling that defendants could retain the plane without being held to the conditions of Vineland's contract with the Government would be an usurpation of the administrative discretion of the disposal agency. It cannot be said with any certainty that the agency would have transferred this plane to Vineland absent the protective provisions of WAA Form 65; thus judgment for defendants in this case would require the court to rewrite the contract for the transfer to Vineland as originally understood by both parties, striking the clauses now felt to be distasteful, without regard to whether the administrative agency would have made the transfer in the absence of these provisions as construed by it.

Cf. *Federal Power Commission v. Idaho Power Company*, 344 U.S. 17. The impropriety of such a result is emphasized in the instant case, where the disposal agency was given broad discretionary powers to fix the price and the terms of the transfer—as well as to determine whether there would be a transfer at all and if so, to whom.

E. Even if the restrictions are contractual, the Government is entitled to damages against Vineland for breach thereof

In its amended complaint, the Government not only sought a declaration that it was the owner of the plane and was entitled to immediate possession thereof, but also, damages against Vineland for breach of contract based on Vineland's failure to abide by the restrictions imposed by WAA Form 65 (R. 23–25, 28). The court below dismissed the Government's complaint on this cause of action as well, on the ground that the restrictions imposed by WAA Form 65 were invalid and so the contract between the Government and Vineland passed to Vineland full and unencumbered title to the plane (R. 132–135). Consequently, the court did not reach the question whether the restrictions, if valid, were violated so that the United States was entitled to recover damages from Vineland for breach of contract.

We have discussed in considerable detail the error of the court in holding that the restrictions were invalid; in this connection, we have shown that the imposition of the restrictions was authorized, if not required, both by the Surplus Property Act of 1944 and by War Assets Administration Regulation 4. See *supra*, pp. 22–36. It remains accordingly, to show that the restrictions were breached. See also *supra*, p. 43.

There could be little dispute that in the absence of a release of the restrictions by the Federal Security Agency, the only Government agency authorized to release same (R. 151)—and the advisory jury as well as the district court found that there was no such release (R. 116, 151)³³—an outright sale of the

³³Although the Finns obtained the CAA registration of title and a ferrying permit, it is clear, under the statute authorizing the CAA power to register titles, that such registration has no significance whatever in a proceeding to adjudicate title. Civil Aeronautics Act of 1938, Section 501 (f), 52 Stat. 1005, as amended, 49 U. S. C. 521 (f). Indeed, the statute provides

plane by Vineland to the Finns would, in the circumstances of this case, violate the terms of WAA Form 65.

That Form, the provisions of which Vineland agreed to by signing it and accepting delivery of the plane thereunder, provided that all property "acquired hereunder is for the sole use of a tax-supported or non-profit institution" for nonflight instruction purposes (Paragraph 2; R. 15). Paragraph 6 of the Form goes on to prohibit flight of aircraft acquired under this program (R. 15), and Paragraph 7 contains the agreement that "all acquired property when unfit for the above purpose (*i. e.* educational nonflight use) will be sold only as scrap and then only after it shall have been rendered completely unfit and useless except for its basic material content" (R. 15-16). Plainly, these provisions of the Agreement would be violated by an outright sale to the Finns, who are not associated with any educational institution and who, as the court below found (R. 151), intended to use the plane for commercial transportation service.

Vineland urged at the trial and continues to urge in this Court, that although it entered into a contract for the sale of the plane to the Finns, the sale was never fully accomplished and even if it were, it was *ultra vires* Vineland. While we believe that Vineland's position has substantial merit (see *infra*, pp. 67-70), the court below disagreed. It held in its Memorandum of Decision that in giving to the Finns a CAA form bill of sale, signed by its superintendent, which declared that the school did "hereby sell, grant, transfer and deliver [to defendants Finns] all of * * * [its] right, title and interest in and to such aircraft" and a "Bill of Sale" on Vineland stationery declaring "We hereby sell * * *," Vineland manifested an intention to pass immediate title to the Finns (R. 130). In addition, it held that the transaction was not invalid under the applicable California statute (R. 131). Should this Court agree with these rulings of the district court to the effect that

that it shall not even be admitted as evidence before a court hearing such a proceeding. The record shows that the Finns were familiar with that provision of the Act (R. 483), but even if they had not known of it, they must be held to have notice of a statute of the United States and cannot rely on their ignorance of the very law which permitted the representation they allegedly relied upon. CAA registration establishes nationality alone. 49 U. S. C. 521 (f).

Vineland did transfer title to the Finns for flight purposes, then it follows that Vineland breached the restrictions against such a sale of the plane and viewing the restriction on sale as contractual only, the United States is entitled to damages for the breach.

Should this Court, however, disagree with these rulings and hold instead that despite these bills of sale, Vineland did not manifest an intention to transfer title to the Finns at least until the necessary governmental releases had been obtained, we believe that the restriction against sale of the plane *qua* plane were nevertheless breached; for the effect of Vineland's giving these documents to the Finns was to enable them to represent to third persons that they in fact were the owners of the plane. This established a strong possibility that bona fide dealings with the Finns by such third parties would create rights against the plane which might result in diverting it from the educational purpose for which the Government transferred it to Vineland. Should this Court hold, contrary to the findings of the advisory jury (R. 114-115), that International was in the position of such a bona fide purchaser, entitled to enforce its chattel mortgage and aircraft lien against the plane even though the Finns did not have title thereto,³⁴ there could be no

³⁴ We do not intend in this brief to engage in a detailed discussion of International's claim that it has rights to the plane even though the Finns lacked title thereto, for we believe that in view of the advisory jury's findings (R. 115), which are supported by more than adequate evidence, International's rights are entirely dependent upon or derivative from those of the Finns. However, brief comment thereon may be in order. International's claim that it had rights to the plane independent of those of the Finns has been predicated on the grounds that (1) International was entitled to the protection given a bona fide purchaser of aircraft by Section 503 (c) of the Civil Aeronautics Act of 1938 and Section 25 of the Surplus Property Act of 1944, (2) the Government is estopped to assert its interest because International relied upon governmental representation that the Finns had title, (3) International held an aircraft lien established under California statutes, and (4) International gained an interest in the plane by accession. The finding of the advisory jury that International had "knowledge or notice" of the Government's claim of title (R. 115) effectively precludes International from contending that it was a bona fide purchaser (*Simons Creek Coal Co. v. Doran*, 142 U. S. 417; *Hazelhurst v. The Lulu*, 77 U. S. 192, 201-202), that it can claim an estoppel on the basis of reasonable reliance on misrepresentations (2 Pomeroy, *Equity Jurisprudence* (4th Ed. 1918), Section 8; *Standard Oil Co. v. United*

doubt that Vineland's action in enabling the Finns to appear to have title to the plane resulted in not only a breach of the restrictions against sale but substantial damages to the United States.

In addition, not only did Vineland breach the restrictions on the sale of the plane, but it also breached the conditions restricting the use to which the plane might be put; *i. e.*, that the plane was to be used for non-flight instructional purposes (Par. 2, R. 15) and that it "will not be used for any actual flight purposes" (Par. 6, R. 15). The undisputed evidence shows that in violation of these restrictions, Vineland permitted the Finns to fly the plane away from the school and to prepare it for even more extensive flight use. While it is true that the Finns had obtained the possession of the plane for these purposes by

States, 107 F. 2d 402 (C. A. 9), certiorari denied, 309 U. S. 673), that it was entitled to the statutory lien (cf. *Santa Cruz Rock Pavement Co. v. Lyons*, 117 Cal. 212), or that it greatly increased the value of the plane without notice of the true state of title (*Union Naval Stores Co. v. United States*, 240 U. S. 284).

If any of these positions were available to International, as a factual matter, we would nevertheless urge that they are inapplicable in this case, as a matter of law. Section 25 of the Surplus Property Act (58 Stat. 765) establishes that a bona fide purchaser can rely on an instrument executed by the disposal agency as being valid under the Act, but does not create any rights superior to the disposal contract. Section 503 (c) of the Civil Aeronautics Act (52 Stat. 1006, 49 U. S. C. 523 (c)) protects a bona fide purchaser from the assertion of a prior conveyance which could have been recorded, but it has no significance here, since the only possible conveyance involved here is the transfer to Vineland (the transfer upon which International must rely), and a sale by the United States of a public aircraft need not be recorded. Civil Aeronautics Act of 1938, Section 503 (a), 52 Stat. 1006, 49 U. S. C. 523 (a); cf. Section 1 (30), 52 Stat. 977, 49 U. S. C. 401 (30). No estoppel can be raised against the United States for the action of CAA officials in representing that the Finns had title, assuming that such representations were made, since CAA officials do not have authority to make such representations. Section 501 (f), 52 Stat. 1005, 49 U. S. C. 521 (f); *City and County of San Francisco v. United States*, 223 F. 2d 737 (C. A. 9). The California aircraft lien is invalid *vis a vis* the Government since it is dependent upon possession (Cal. Code Civil Proc. Sec. 1208.61) and cannot, in any event, effect property of the United States which can be disposed of only by Congress. United States Constitution, Article IV, Sec. 3, Cl. 2; *United States v. Allegheny County*, 322 U. S. 179; likewise, the Government's title to the plane could not have been lost to the airport by accession, absent congressional authority therefor.

representing to Vineland that they had obtained the releases of restrictions, as required by the Vineland-Finn agreement, this does not excuse Vineland's dereliction of its responsibilities in the matter; Vineland accepted the Finns' representation at face value without making any inquiry from state or federal surplus property agencies, with which Vineland had had extensive correspondence, to determine whether a release of the restrictions had in fact been obtained by the Finns. Ordinary caution would have caused any school to make such inquiry, and Vineland had even greater reason to investigate, since it had been involved in previous difficulties relating to the sale of another plane under this same surplus property disposal program (Plaintiff's Exhibit 13). By this conduct, which, viewed even in its best light, constituted negligent disinterest, Vineland permitted the plane to be flown for noneducational purposes by persons who were not connected with any educational institution. The entire purpose of the transfer to Vineland was violated as soon as Vineland lost custody of the plane and it ceased to serve an educational purpose. Or, in terms of the WAA Form 65, the restrictions imposed by Paragraphs 2 and 6 were breached by the delivery of the plane to the Finns for these flight purposes.

Finally, even if the terms of the contract between Vineland and the Finns had been rigidly followed, and Vineland had not released custody of the plane prematurely, the record indicates that the Vineland-Finn agreement contemplated a transfer in violation of Paragraph 7 of the WAA Form 65. The Vineland-Finn contract provided that "[i]n the event that the Contractors [*i. e.*, the Finns] are unable to secure the aforesaid Government releases within one (1) year from the date of this agreement * * * said Contractors shall, nevertheless, be entitled to delivery of the aforesaid C-46 Aircraft No. 23645 for *salvage purposes only* * * *" (R. 64). Paragraph 7 of WAA Form 65, on the other hand, expressly prohibits transfer of the plane by Vineland at any time unless the plane is first reduced to its basic material content so that it can serve only as *scrap* (R. 15-16). Section 8304.1 *infra*, pp. 89-90, carefully distinguishes between salvage and scrap; according to that section, scrap means "property that has no reasonable prospect

of sale except for its basic material content,” whereas “[s]alvage has some value in excess of its basic material content because it may contain serviceable components or may have value to a purchaser who may make major repairs or alterations.” At the trial below, this difference was emphasized by the testimony of the personnel from the administrative agency (R. 758–759, 852), other expert witnesses (R. 299), and the Finns themselves (R. 451–453). Since the Vineland-Finn contract contemplated that if the requisite government releases for flight use were not obtained, the plane was to be transferred to the Finns for *salvage*, it seems clear that this further provision of the contract constituted a breach of the restrictions of WAA Form 65 for which the United States was entitled to recover damages.

II

The District Court erred in awarding affirmative judgment against the United States on the Finns’ counterclaim

Until this point, we have discussed the District Court’s action in dismissing the Government’s complaint and have shown that, contrary to the holding below, the Government did have title to the plane and was entitled to immediate possession thereof. In these circumstances this Court should reverse the judgment below not only in so far as it dismisses the Government’s complaint but also in so far as it awards the Finns’ judgment on their counterclaim against the Government. For the latter action is necessarily predicated on the holding that the Government did not have title to and was not entitled to immediate possession of the plane and, with the collapse of the holding, there is no basis for assessing damages against the Government for obtaining possession of the plane by invoking the California claim and delivery procedure. Moreover, even if the court below were correct in dismissing the Government’s complaint, we believe that nevertheless the court below erred in awarding judgment against the United States on the Finns’ counterclaim.

A. The District Court did not have jurisdiction to entertain the Finns' counterclaim against the Government

Having found that the Government had no title or right to possession to the plane, the court below ruled that the Finns were entitled to recover on their counterclaim. The judgment specified that the Finns should recover either possession of the plane in the same order and condition as when taken by the Government, ordinary wear and tear excepted (R. 160-161), or, should the Government so elect, the sum of \$50,000 (R. 161), the advisory jury's valuation of the plane, as of the date of the commencement of this proceeding (R. 117). In addition, the court ordered that the Finns should recover from the Government for loss of use of the plane "the sum of \$12,300³⁵ plus the sum of \$15 per day for each and every day such delivery of possession or alternative payment herein provided is delayed after December 31, 1954" (R. 161). We submit that the United States had not consented to maintenance of such a counterclaim against it and that, as a result, the district court did not have jurisdiction to entertain the claim or to award judgment thereon,³⁶ for it is axiomatic that the United States cannot be subjected to suit except to the extent that Congress has expressly waived the Government's sovereign immunity and consented to that action; in the absence of such consent, it is settled that there can be no jurisdiction to entertain such proceedings or to order judgment against the United States.

³⁵ The \$12,300 sum represents \$15 per day for each day between the seizure of the plane by the Marshal (September 18, 1952) and December 31, 1954, excepting the period during which the Finns held the plane by reason of their unauthorized repossession (January 18, 1953, to February 1, 1953).

³⁶ The court below suggested that its jurisdiction over the counterclaim rested upon the fact that it was a compulsory counterclaim within the meaning of Rule 13 (a) of the Federal Rules of Civil Procedure and therefore ancillary to the principal action. However, the Federal Rules were not intended to expand the district courts' jurisdiction over suits against the United States (see *infra*, pp. 59-60). The courts have consistently held that there is no greater jurisdiction over an unconsented (compulsory) counterclaim than over any other unconsented suit. *E. g.*, *Mitchel v. Floyd Pappin and Sons, Inc.*, 122 F. Supp. 755 (D. Mont.); cf. *United States v. Wessel, Duval and Co.*, 115 F. Supp. 678 (S. D. N. Y.); 3 Moore's *Federal Practice* (2d ed.), sec. 13.28, pp. 75-76.

1. *The Government's invocation of the California claim and delivery procedure did not constitute consent to the maintenance of the counterclaim.* The format of the award made on the Finns' counterclaim corresponds to the form of judgment which a California state court would make whenever a plaintiff's claim for recovery had been denied after he had gained possession of disputed property by California claim and delivery procedure.³⁷ At the conclusion of a suit to recover possession of personal property in a California state court, the trier of fact determines who is entitled to possession, and, if that is not the person currently holding the property, the value of the property and damages "which the prevailing party has sustained by reason of the taking or detention of such property (Calif. Code Civil Proc., sec. 627, *infra*, p. 99). Judgment is then entered for the prevailing party quieting his possession if he holds the property. But in the event the other party holds the property, as the Government holds it in the present case, judgment is entered "for the possession or the value thereof, in case such a delivery cannot be had, and damages for the detention" (*id.*, sec. 667). Plainly the court below adopted the California provisions in formulating its judgment here. In so doing, the court below clearly erred, for whatever the applicability of the state provisions in cases not involving the Government, these provisions are completely inapplicable to the United States.

³⁷ Under that procedure (Calif. Code Civil Proc., secs. 509-521, 627, 667, *infra*, pp. 97-100), the plaintiff in an action to recover the possession of personal property may, by executing the proper affidavit (*id.*, sec. 510) and posting the specified undertaking by sureties (*id.*, sec. 512), cause the sheriff to seize the property on his behalf. Defendant can obtain a return of possession by demonstrating the insufficiency of plaintiff's sureties (*id.*, sec. 513) or by giving the sheriff an undertaking by two or more sureties for double the value of the property (*id.*, sec. 514). If the defendant does not reclaim the property within five days after receiving notice of the seizure, the sheriff proceeds to deliver the property to the plaintiff pending an adjudication of the merits of his claim (*id.*, sec. 514); the plaintiff's possession is entitled to the protection of a court order if that should prove necessary (*id.*, sec. 521). It was just such a process that was used by International in its state suit against the Finns and was later employed by the Government at the outset of the present proceedings, pursuant to Rule 64 of the Federal Rules of Civil Procedure which permits the use of state attachment procedure in connection with cases pending in the federal courts.

Certainly, the state statutes themselves cannot be considered to have impaired the rights or defenses of the Federal Government, for that result would be inconsistent with the basic postulates of our Federal system. Nor does the fact that the United States Attorney initiated the use of claim and delivery procedure under Rule 64 of the Federal Rules of Civil Procedure have any bearing on the availability against the Government of the state provided remedy against one who invokes this procedure, since Congress alone has the power to consent to such suits. See *Carr v. United States*, 98 U. S. 433, 438. No attorney, indeed no officer of the executive branch, has authority to waive the Government's immunity intentionally or, *a fortiori*, accidentally. See *Stanley v. Schwalby*, 162 U. S. 255, 270; *United States v. Lee*, 106 U. S. 196, 205; *United States v. Shaw*, 309 U. S. 495, 501. While assertion of claims by way of set-off or recoupment in an action brought by the United States have been permitted on the theory that such remedies are merely defensive and necessarily affect the measure of damages which the Government should recover (Act of March 3, 1797, secs. 3, 4, 1 Stat. 514-515, as now formulated, 28 U. S. C. 2406; see *Bull v. United States*, 295 U. S. 247; *United States v. MacDaniel*, 7 Pet. (10 U. S.) 1), that right of set-off is limited to defensive claims and has not been expanded to permit affirmative *in personam* counterclaims in suits brought by the Government. See *National Bank v. Republic of China*, 348 U. S. 356, 358 (fn. 2), 368-369; *United States v. Shaw*, 309 U. S. 495, 501-504; *United States v. Buchanan*, 8 How. (49 U. S.) 83, 105.³⁸ The counterclaim asserted by the Finns and the recovery allowed thereon are clearly affirmative and do not come within the rule permitting defensive set-offs.

Similarly, no basis for an affirmative judgment in a counterclaim can be derived from the fact that the California pro-

³⁸ See also *United States v. United States Fidelity and Guaranty Co.*, 309 U. S. 506; *In re Greenstreet*, 209 F. 2d 660 (C. A. 7); *United States v. Patterson*, 206 F. 2d 345 (C. A. 5); *United States v. Hosteen Tse-Kesi*, 191 F. 2d 518 (C. A. 10); *Bowles v. Crow*, 59 F. Supp. 809 (S. D. Cal.); *United States v. Lauer*, 45 F. Supp. 670 (E. D. Pa.); *United States v. Dugan Bros.*, 36 F. Supp. 109 (E. D. N. Y.).

cedure was invoked under the Federal Rules of Civil Procedure. In considering the relationship between the Federal Rules and governmental immunity, one is immediately faced by the necessary conclusion that neither Rule 64 nor any other provisions in the Federal Rules purport to change the substantive rights of ordinary litigants, let alone the United States. See *United States v. Sherwood*, 312 U. S. 584, 591; *Mississippi Pub. Corp. v. Murphree*, 326 U. S. 438, 444-445; *Ragan v. Merchants Transfer and Whse. Co.*, 337 U. S. 530, 532-533. In addition to the general statement in Rule 82 that "[t]hese rules shall not be construed to extend or limit the jurisdiction of the United States district courts * * *," Rule 13 (d) specifically provides the "rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the United States or any officer or agency thereof." And in *United States v. Sherwood*, *supra*, the Supreme Court, discussing the impact of the Rules on the Government's immunity to suit as a joint defendant in a contract action, summarized their effect as follows (312 U. S. at 589-591):

* * * But we think that nothing in the new rules of civil practice so far as they may be applicable in suits brought in district courts under the Tucker Act authorizes the maintenance of any suit against the United States to which it has not otherwise consented. An authority conferred upon a court to make rules of procedure for the exercise of its jurisdiction is not an authority to enlarge that jurisdiction; and the Act of June 19, 1934, 48 Stat. 1064, 28 U. S. C. 723b, authorizing this Court to prescribe rules of procedure in civil actions gave it no authority to modify, abridge or enlarge the substantive rights of litigants or to enlarge or diminish the jurisdiction of federal courts.

* * * * *

* * * the matter is not one of procedure but of jurisdiction whose limits are marked by the Government's consent to be sued. That consent may be conditioned, as we think it has been here, on the restriction of the issues to be adjudicated in the suit, to those

between the claimant and the Government. The jurisdiction thus limited is unaffected by the Rules of Civil Procedure, which prescribe the methods by which the jurisdiction of the federal courts is to be exercised but do not enlarge the jurisdiction.

Indeed, if any significance can be attached to the details of the claim and delivery procedure used, *vis a vis* the Government's amenability to this counterclaim, it is that the United States has expressly withheld consent to such an action. Unlike a private litigant, the Government was free from the obligation of filing a bond or obtaining sureties as a prerequisite to its use of the claim and delivery procedure, since Congress has determined that "[s]ecurity for damages or costs shall not be required of the United States, any department or agency thereof or any party acting under the direction of any such department or agency on the issuance of process or the institution or prosecution of any proceeding." 28 U. S. C. 2408; cf. *United States v. Bryant*, 111 U. S. 499, 504-505; *Black Diamond v. Stewart and Sons*, 336 U. S. 386, 394; *Brown v. Beckham*, 137 F. 2d 644 (C. A. 6), certiorari denied, 320 U. S. 803; *The William J. Riddle*, 111 F. Supp. 657 (S. D. N. Y.). As the Sixth Circuit pointed out in *Beckham*, one important purpose of the statute giving the Government the right to proceed without bond was the desire to provide uniformity in the Government's rights and remedies, regardless of the chance location of the property. Cf. *Clearfield Trust Co. v. United States*, 318 U. S. 363; *United States v. Standard Oil Co.*, 332 U. S. 301. Certainly, that policy militates strongly against the conclusion that the Government has consented to suit in those jurisdictions where state law allows affirmative recovery against a plaintiff who has attached property, while like liability would not be incurred by the Government in the numerous jurisdictions where such is not the case. See, e. g., *Overbury v. Platten*, 108 F. 2d 155 (C. A. 2), certiorari denied, 311 U. S. 664; *Brown v. Peoples Nat. Bk.*, 39 Wash. 2d 776, 238 P. 2d 1191; *Slaughter v. Nolan*, 41 S. D. 134, 169 N. W. 232.

2. *United States v. The Thekla*, 266 U. S. 328, does not support jurisdiction to enter an affirmative judgment on the Finns' counterclaim. Apparently recognizing that its jurisdiction to

enter judgment against the United States on the Finns' counterclaim could not be founded on the Government's use of California claim and delivery procedure, the court below proposed two theories upon which the necessary consent to suit might be predicated. The first of these ³⁹ is represented by *United States v. The Thekla*, 266 U. S. 328, where the Supreme Court allowed an affirmative recovery by a defendant in a suit for damages from a collision brought by the United States.⁴⁰ The basis of that decision was that in an admiralty proceeding, such as was there involved, the Government's libel and the cross-libel are interdependent and a proper division of the damages stemming from the collision between the ships can be made only by disposing of both libels. Thus, the decision did not in fact concern a consent to suit, implied or otherwise, but rather dealt with the definition of a single claim for damages from a maritime collision. Because the Supreme Court spoke of an "implication that justice may be done with regard to the subject matter" (*The Thekla*, *supra*, at 340), a few courts read the opinion as allowing other affirmative counterclaims against the Government, even though the Court also cited cases supporting the proposition "that generally speaking a claim that would not constitute a cause of action against the sovereign cannot be asserted as a counterclaim" and added that "[w]e do not qualify the foregoing decisions in any way * * *" (*id.* at 339).

The true meaning of *The Thekla* was explained at length in the Supreme Court's unanimous opinion in *United States v. Shaw*, 309 U. S. 495, where the Court ruled that a state probate court had no jurisdiction to entertain an affirmative counterclaim against the United States. In reply to the argument that the case was governed by the rule in *The Thekla* on the ground that the Government filed the initial claim and that the proceedings were *in rem*, the Court said (at pp. 502-503):

³⁹ The court below also cited as supporting this rule *The Siren*, 7 Wall. (74 U. S.) 152; 28 U. S. C. 2406; and *United States v. Shaw*, 309 U. S. 495. However, these authorities relate to the right to interpose defensive claims by way of set-off or recoupment (discussed *supra*, p. 58, and *infra*, pp. 62-63), and do not in any way support the existence of jurisdiction to enter an affirmative judgment against the United States on a counterclaim.

⁴⁰ The second theory is that of a taking under the Fifth Amendment and is discussed, *infra*, pp. 63-66.

* * * Respondent further insists that his position is supported by *The Thekla* and subsequent decisions quoting its language. Emphasis is placed upon the fact that these probate proceedings are in rem or quasi in rem as were the libels in admiralty in *The Thekla*.

It is not our right to extend the waiver of sovereign immunity more broadly than has been directed by the Congress. We, of course, intimate no opinion as to the desirability of further changes. That is immaterial. *Against the background of complete immunity we find no Congressional action modifying the immunity rule in favor of cross-actions beyond the amount necessary as a set-off.*

The Thekla turns upon a relationship characteristic of claims for collision in admiralty but entirely absent in claims and cross-claims in settlement of estates. The subject matter of a suit for damages in collision is not the vessel libelled but the collision. Libels and cross-libels for collision are one litigation and give rise to one liability. In equal fault, the entire damage is divided. As a consequence when the United States libels the vessel of another for collision damages and a cross-libel is filed, it is necessary to determine the cross-libel as well as the original libel to reach a conclusion as to liability for the collision. That conclusion must be stated in terms of responsibility for damages.

* * * *

* * * There is little indication in the facts or language of *The Thekla* to indicate an intention to permit generally unlimited cross-claims. * * *

The ruling in the *Shaw* case was emphasized by the Supreme Court's opinion in the companion case of *United States v. U. S. Fidelity and Guaranty Co.*, 309 U. S. 506. Its vigor has been maintained by subsequent rulings of the Supreme Court (*e. g.*, *National Bank v. Republic of China*, 348 U. S. 356, 358, fn. 2) and of this Court. *E. g.*, *United States v. Merchants Transfer*

and Storage Co., 144 F. 2d 324, 327 (C. A. 9).⁴¹ See also *United States v. Davidson*, 139 F. 2d. 908, 911 (C. A. 5).

3. *The just compensation provisions of the Fifth Amendment does not support jurisdiction to enter affirmative judgment against the United States on the Finns' counterclaim.* The second theory relied on below to support its jurisdiction to enter an affirmative judgment against the United States on the Finns' counterclaim was that the Government's seizure pursuant to California claim and delivery procedure constituted a "taking" for public use for which the Fifth Amendment requires just compensation (R. 139). The reasoning of the district court was that any physical seizure of property constitutes a "taking" within the meaning of the Fifth Amendment, and that the benefit which the Government derived from holding the plane as security showed that the taking was "for public use" in the sense used in the Amendment (R. 139-40). We submit that both these conclusions are erroneous and that under well-established principles this was not a "taking for public use." But, even if it were such a taking, the district court had no jurisdiction to entertain the claim in the form and for the amount granted.

(a) The ruling that the use of judicial attachment procedure, ancillary to a civil lawsuit, is a Fifth Amendment taking is both novel and extraordinary. We have been unable to find a single case in which any other court has ever reached such a conclusion; indeed, our research indicates that apparently no litigant has ever before advanced such a contention. The facts of this case show that the United States did not exercise its power of eminent domain to seize the plane with the intent to apply it for public use; rather the Government utilized a judicial procedure available to every litigant as a means of sequestering property for security against potentially judgment proof defendants. Indeed, the Finns could have regained possession of the plane by posting the specified undertaking of sureties. Furthermore, the physical seizure was originally made by the

⁴¹ In the *Merchants Transfer & Storage* case, this Court recognized that the holding in *The Thekla* "has been limited to the necessities of proceedings in admiralty, where the court is obliged to determine the cross-libel as well as the original libel to reach its conclusion" (144 F. 2d. at 327).

United States Marshal acting as an officer of the court; the Government, *qua* litigant, received constructive possession of the plane from the court's officer after the Finns had failed to exercise their statutory right to redelivery. In all these respects, the Government's acquisition of the plane differs from the recognized scope of a Fifth Amendment taking.

Moreover, it is well established that there is no constitutional taking when the Government seizes property to which it claims to have superior title. *Tempel v. United States*, 248 U. S. 121; *Hill v. United States*, 149 U. S. 593; *Langford v. United States*, 101 U. S. 341; see *United States v. Lynah*, 188 U. S. 445, 465; *Twin Falls Canal Co. v. American Falls Res. Dist. No. 2*, 59 F. 2d 19, 24 (C. A. 9). The essence of a taking for public use is an appropriation of property admittedly not owned by the Government in order to meet some public need which is considered superior to the individual's interest. There is no indication here that the Government has any desire to retain this plane should its claim to title be defeated. In all likelihood, the appropriate administrative officials will return the plane if the courts determine that the Finns had a superior interest, but even if they retained the plane, the seizure here was made under claim of title so that the remedy, if any, would be in tort (but see *infra*, p. 66, fn. 43), rather than a claim under the Fifth Amendment.

A further factor demonstrating the absence of a Fifth Amendment taking was the lack of authority to effect such a taking.⁴² "In order that the Government shall be liable it must appear that the officer who has physically taken possession of the property was duly authorized so to do, either directly by Congress or by the official upon whom Congress conferred the power." See *United States v. North American Transportation and Trading Co.*, 253 U. S. 330, 333; see also to the same effect, *United States v. Goltra*, 312 U. S. 203, 208-209; *Mitchell v. United States*, 267 U. S. 341, 346; *Hooe v.*

⁴² Presumably the taking referred to by the court below was acceptance of the plane by the United States Attorney rather than the original seizure by the Marshal, for if the Marshal's seizure were a constitutional taking the eminent domain power would be exercised every time a private litigant invoked attachment procedure.

United States, 218 U. S. 322, 335–336. There was no Act of Congress authorizing the United States Attorney or anyone else to seize the plane for public use, either by specific reference to that plane or as a part of some broad plan. Without such congressional action, the seizure would have been unauthorized and therefore could not have been a constitutional taking. Cf. *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U. S. 579. On the other hand, the United States Attorney did have power to use the procedure established by the courts for obtaining security pending governmental litigation, pursuant to his authority under 28 U. S. C. 507 (a) (2) to “[p]rosecute or defend, for the government, all civil actions, suits or proceedings in which the United States is concerned.”

(b) Even if this were a Fifth Amendment taking, this would go only to the existence of a claim against the Government; it would have no bearing on the jurisdiction of the court below to entertain the claim. That matter would still be governed by the terms of the consent to suit as formulated by Congress. The jurisdiction of the district court to hear claims against the United States for just compensation under the Fifth Amendment derives from and is limited by 28 U. S. C. 1346 (a), commonly known as the Tucker Act. Both the amount claimed in the counterclaim and the amount awarded thereon were far in excess of the \$10,000 jurisdictional limit specified in that Act. 28 U. S. C. 1346 (a) (2); cf. *North Dakota-Montana Wheat Growers’ Ass’n. v. United States*, 66 F. 2d 573 (C. A. 8), certiorari denied, 291 U. S. 672. Moreover, although the Tucker Act established jurisdiction to hear original claims for compensation, it would not have warranted the court below to entertain such a suit as a counterclaim. *United States v. Nipissing Mines Co.*, 206 Fed. 431 (C. A. 2); *North Dakota-Montana W. G. Ass’n. v. United States*, 66 F. 2d 573 (C. A. 8), certiorari denied, 291 U. S. 672; *Oyster Shell Products Co. v. United States*, 197 F. 2d 1022 (C. A. 5), certiorari denied, 344 U. S. 885; see 3 Moore’s *Federal Practice* (2d ed.), sec. 13.29; cf. *Nassau Smelting Works v. United States*, 266 U. S. 101; *United States v. Skinner & Eddy Corp.*, 35 F. 2d 889 (C. A. 9), certiorari dismissed 281 U. S. 770.

And, assuming this were a Fifth Amendment taking, the measure of damages would be the value of the plane when seized plus interest as part of just compensation. See *United States v. Klamath Indian Tribe*, 304 U. S. 119, 123; *Brooks-Scanlon Corp. v. United States*, 265 U. S. 106, 123; cf. *United States v. Alcea Band of Tillamooks*, 341 U. S. 48, 49. The judgment of the court below provided for an alternative return of the plane or a payment of its value plus \$15 per day for the period during which the Finns are deprived of the plane or its value. Even if we ignore the obvious irregularity of an alternative judgment in such a case, it is clear that 10.9% (\$15 per day on \$50,000) would be an unreasonably exorbitant interest rate. Cf. *United States v. Rogers*, 255 U. S. 163; *United States v. Highsmith*, 255 U. S. 170.⁴³

B. The Finns were not entitled to judgment since they had neither title nor a right to possession of the plane at the time the Government sequestered it

It is well established under California law that damages cannot be recovered for the deprivation of property, whether by claim and delivery procedure or otherwise, except by one who had an immediate right to possess that property at the

⁴³ In support of the measure of damages used, the court below cited various sections of the Federal Tort Claims Act (*i. e.*, 28 U. S. C. 2674, 2680), apparently suggesting that the reference to state law made by that Act can be used in applying other statutes waiving governmental immunity. It is clear, however, that each act consenting to suit against the United States must be considered independently of all others. The district court did not suggest that its jurisdiction was founded upon the Federal Tort Claims Act, nor would such a theory be tenable. Although statutory liability may result from wrongfully obtaining property through claim and delivery procedure, it is not a tort in California, unless it was done with malice and without any probable cause. *Vesper v. Crane Co.*, 165 Cal. 36, 130 Pac. 876; cf. *Owens v. McManus*, 108 Cal. App. 2d 557, 239 P. 2d 72. That the United States had reasonable ground upon which to institute these proceedings is evident from the decision of the district court in Michigan ruling that the Government was entitled to the plane in almost identical circumstances. *United States v. School District No. 2*, 124 F. Supp. 570 (E. D. Michigan). Indeed, even if the seizure had been tortious, the Finns' counterclaim would be barred from proceeding under the Federal Tort Claims Act by the exception stated in 28 U. S. C. 2680 (h), and in any case there is no suggestion in the Federal Tort Claims Act of a waiver of governmental immunity from counterclaims seeking affirmative judgment against the United States.

time it was taken. *Sidney v. Wilson*, 67 Cal. App. 282, 227 Pac. 672; cf. *National Funding Corp. v. Stump*, 57 Cal. App. 2d 29, 133 P. 2d 855. This same rule is applied in almost every other jurisdiction and is a basic part of the common law. See, e. g., *J. E. McMillan Hdwe. Co. v. Ross*, 24 Okl. 696, 104 Pac. 343; *Rahis v. McLeod*, 45 Nev. 380, 204 Pac. 501; 54 C. J. S. 612, 614, 626. It is not enough for one who seeks to recover damages to show that the defendant's possessory interest is defective; he must affirmatively demonstrate his own right to immediate possession. We submit that in this case the Finns have failed to make such a showing in that either (1) the Finns never received title or a general right to possession from Vineland, or (2) the Finns lost any title or possessory right they might have had to International. No claim for damages from the Government has been made by Vineland or International, so that we are concerned here only with the Finns' right to recover damages.

1. *The Finns never received title or general right of possession from Vineland.* The contract between Vineland and the Finns provided that "It Is Expressly Agreed and Understood, that this agreement is contingent upon Contractor's ability to secure the necessary clearances from the Government of the United States of America on restrictions now existing on the use and possession of the aforescribed C-46 aircraft * * *" (R. 62). The Finns were allowed six months to secure the clearances and to perform their other obligations under the contract, with an option to be released from most of their contractual obligations if the clearances could not be obtained (R. 62-63). Failure to obtain the clearances or to perform their other obligations under the contract within six months would not necessarily be fatal to the contract, since the Finns were allowed a right to receive a six months' extension on the deadline for performance. After the expiration of one year, the Finns could obtain the plane for salvage purposes only if they provided satisfactory assurance that they would not violate any governmental restrictions (R. 64).

It is therefore clear that the parties manifested an intention to impose a stringent condition precedent on the sale of the plane to the Finns. The district court made no reference in its opinion to the language of the contract but decided that

Vineland has transferred full title to the Finns (R. 156, 160), apparently relying upon the CAA Form Bill of Sale issued to the Finns by Vineland's superintendent (Plaintiff's Exhibit 5).⁴⁴ This Bill of Sale, which was issued pursuant to Paragraph I of the contract between Vineland and the Finns (R. 60), may have been sufficient when combined with possession by the Finns to clothe the Finns with sufficient indicia of ownership to pass good title to a bona fide purchaser. See *supra*, p. 52. It is not sufficient, however, to establish the Finns' title or right to possession in an action where they assert a right to damages for the loss of that property. Paragraph I (R. 60), which called for the issuance of a Bill of Sale, is clearly subsidiary to Paragraph IV (R. 62-64), which established that the obtaining of government clearances and the performance of the other Finn obligations were conditions precedent "notwithstanding any other provisions in this agreement * * *." Moreover, the Bill of Sale, itself, indicates on its face that it has no standing superior to the contractual rights of the Finns established by their contract with Vineland, since Vineland carefully inserted on the Bill of Sale the words "as per agreement dated 28, February 1951" (Plaintiff's Exhibit 5). Furthermore, the advisory jury determined that Vineland did not intend to transfer title to the plane "at any time before all necessary consents and releases and waivers of the Government had been procured" (R. 112). The restrictions were never released (R. 116, 151), and most of the other obligations owed by the Finns under their contract have never been performed (R. 473). Thus, viewing the Finns' custody of the plane in its most hospitable light, they held it only because they misrepresented to Vineland that the Government had consented to a transfer, and they were obliged to return it to Vineland until they performed their part of the contract.

⁴⁴ In its Memorandum of Decision, the court below also referred to a "Bill of Sale which was typed on the letterhead stationery of the School District," dated October 9, 1950, which reads "We hereby sell * * *" (R. 130). The court was there discussing Vineland's Exhibit G; however, that document has no significance in determining whether Vineland sold the plane in suit to the Finns, since it relates to a different plane bearing a different serial number, which was sold to the Finns by Vineland long before the Finns sought to buy the plane involved in this action (Vineland's Exhibit G).

Such an interest is insufficient to support an action for the damages claimed by the Finns.

Indeed even if Vineland had intended to pass title to the Finns, no conveyance was made which conformed with California law governing the required form for the sale of property held by school districts. California Education Code, Sec. 18701, provides:

The governing board of any school district may sell to the highest bidder *for cash* any personal property belonging to the district not required for school purposes, or which should be disposed of for the purpose of replacement, or because unsatisfactory, or not suitable for school use, after notice given by publication in a newspaper of general circulation published in the county for a period of not less than two weeks, or by posting notice in at least three public places in the district for not less than two weeks.

It should be noted that the sale to the Finns was only partially for cash consideration; \$16,000 of the total \$21,000 consideration was represented by a replacement airplane and extensive services which the Finns promised to provide. It is well established in California that the sale of property by a school district in a manner different from that which is prescribed by the state statutes is void and unenforceable. See *Miller v. McKinnon*, 20 Cal. 2d 83, 124 P. 2d 34; *Los Angeles Dredging Co. v. Long Beach*, 210 Cal. 348, 291 Pac. 839; *Reams v. Cooley*, 171 Cal. 150, 152 Pac. 293; *Zottman v. San Francisco*, 20 Cal. 96. The statutory provisions must be rigorously followed, and no significant deviation is authorized. *Ibid*. This policy is predicated on such considerations as the necessity for uniform selling methods throughout the state and for strict limitations on the power of a school board to sell property which will ensure that the sales are consistent with the interests of the community they represent.

The contract between Vineland and the Finns failed to conform with the governing statute in at least two important aspects. Nowhere in the California Code is there authority for a school board to barter for the disposal of school district property. Ability to exchange one plane for another enables the

school district to exercise discretion in evaluating the property of the school and that of the bidder; no such discretion was given to the school board. Rather, the statute calls for sales for cash, a method under which little or no discretion is left to the trustees of the school who must accept the highest liquidated bid. And, the ability to accept property instead of cash could often lead to the involvement of schools in the numerous complicated problems associated with potentially encumbered real or personal property. The second substantial deviation from the statutory method for disposal of property was the acceptance of services from the Finns as a major portion of the total consideration. Some of the same factors which militate against allowing a school board to barter for property are applicable to a sale for services. Indeed, California has carefully required that the purchase of services must also be for cash and must be made pursuant to the same type of bidding format as is required for the sale of school property. California Education Code, Sec. 18051.

Finally, even if the Notice for Bids (R. 57-58) had followed the applicable provisions of California law, the contract did not conform with the terms of the notice in the manner specifically ordered by California Education Code Section 18701, *supra*. Again, this rule is based upon the need to limit the discretion of the school board so as to prevent dissipation of public funds, and it is rigorously enforced. See *Miller v. McKinnon*, 20 Cal. 2d 83, 88, 124 P. 2d 34; 18 A. G. O. (Cal.) 1. Yet, here the Notice indicated that there would be no transfer of the plane until Government clearance had been obtained, while the contract provided for the execution of an immediate bill of sale plus a right by the Finns to make repairs and otherwise alter the plane prior to receipt of those clearances. In addition, the Notice indicated that no sale would be made at any time unless the requisite clearances were obtained, but the contract indicated that the Finns could eventually obtain the plane for salvage use even though clearance was not obtained. These two variances from the Notice are certainly sufficient to have caused other potential bidders not to have filed a bid and therefore defeated the purpose as well as the language of the California statutes.

2. *The Finns lost to International whatever possessory right they might have had.* Assuming, *arguendo*, that Vineland obtained good title to the plane and conveyed that title to the Finns, the Finns lost their title and right to possess the plane to International. On August 31, 1951, the Finns executed a chattel mortgage of the plane (R. 35-39) as security for a \$15,000 loan given them by International. Under the terms of that mortgage the entire debt would be due upon default of any payments or for any other reason which would cause the mortgagee to be insecure (R. 37-38). On the same date, the Finns also executed a lease of the plane to International for eighteen months commencing with the completion of repairs by International (International's Exhibit G). And, from the date that the plane was delivered to International until May 25, 1952, International retained possession of the plane pursuant to the lease and a general agreement for repair services (International's Exhibit E); during that period the airport made the specified repairs and was entitled to payment therefore in the amount of \$10,200 (R. 152).

On May 25, 1952, the Finns violated the terms of the lease, the agreement, and the mortgage by taking the plane from International by threat of force (R. 476-479). As a result, International brought an action to recover the plane in the Los Angeles Superior Court on May 28, 1952, and employed the California claim and delivery procedure as a part of that action (R. 153). The plane was delivered to International by the county sheriff on June 15, 1952, after the Finns failed to give the specified written undertaking (R. 153), but the Finns immediately regained possession of the plane by force and excluded International from possession thereof (R. 154). International's action to recover the plane, which was combined with a later action to foreclose on the chattel mortgage of the plane, resulted in a judgment for International by the Los Angeles court (International's Exhibit D). That court ordered, *inter alia*, that International "do have and recover from the defendants (*i. e.*, the Finns) the possession of that certain * * * Curtis C-46 aircraft * * *," "that the chattel mortgage dated August 31, 1951, be enforced and foreclosed upon the aircraft covered by said mortgage," and "that defendants and each of them, and all persons claiming

under them or either of them, be foreclosed of any equity or redemption right, claim, title or other interest in said aircraft * * *” (International’s Exhibit D).⁴⁵ The court below agreed that these documents established International’s right to the plane or any proceeds related thereto and therefore ordered that “if plaintiff (*i. e.*, the Government) should elect to deliver to Defendants George C. Finn and Charles C. Finn * * * that certain Curtis C-46A aircraft * * * said aircraft shall be delivered instead to Defendant, International Airports, Inc. * * *” (R. 176), after which International shall deliver it to the Los Angeles County Sheriff for disposition in accordance with the order of the county court (R. 177). Any doubt as to the Finns’ right to the plane was eliminated by the order of the court below that “defendants Charles C. Finn and George C. Finn, their agents, employees, representatives, and any and everyone acting for or on behalf of said defendants Charles C. Finn and George C. Finn or either, be and they hereby are enjoined and restrained from moving, flying, or doing anything with or to the aircraft herein above specifically described * * *” (R. 177). We submit that these orders are wholly inconsistent with an award of damages to the Finns for the loss of the plane in question. It is clear that at the time the Government sequestered the plane (September 18, 1952), the Finns had lost any interest that they might have had in the plane and that they certainly had neither the title nor the right to possession which are necessary to maintain an action for damages. Moreover, if International should bring its own action for conversion against the United States, the effect of the decision below is to subject the Government to a possible double liability.

⁴⁵ The pleadings and decision in the Los Angeles County case are all included in the record: The complaint filed to recover the plane (International’s Exhibit N), the associated affidavit for claim and delivery (International’s Exhibit O), and the answer thereto filed by the Finns (International’s Exhibit P); the complaint for foreclosure of the chattel mortgage (International’s Exhibit Q) and the answer thereto (International’s Exhibit R); the Findings of Fact and Conclusions of Law of the Los Angeles County Court in both cases (International’s Exhibit S) and the Final Judgment of that court (International’s Exhibit D).

C. The District Court erred in awarding damages for detention after judgment

Assuming, *arguendo*, that the Finns were entitled to recover the plane or its value and damages for detention, the judgment below was nevertheless erroneous. If, as the court below apparently decided the measure of damages is established by California law, damages for detention cannot run for a period after judgment.⁴⁶ See *Drinkhouse v. Van Ness*, 202 Cal. 359, 379, 260 Pac. 869, 875; *Los Angeles Furniture Co. v. Hansen*, 46 Cal. App. 5, 188 Pac. 292; *Smith v. Pilgrim*, 117 Cal. App. 244; *Ruzanoff v. Retailers Credit Ass'n*, 97 Cal. App. 682, 686, 276 Pac. 156. The judgment in this case calls for damages accruing continuously until the plane or its monetary equivalent is returned. The award of \$15 per day should be limited to the period before judgment was entered, *i. e.*, before February 7, 1955 (R. 162).

⁴⁶ The same rule is applied in almost every other jurisdiction that allows damages for detention, and therefore it probably represents the Federal rule as well. It stems from the principle that courts will not predict prospective damages for which there can be a later remedy and have no jurisdiction to assess them, even on a conditional basis, until they have actually accrued. See *C. J. S., Damages*, secs. 29, 31 (b). Some jurisdictions consider that any award of damages for detention is premature unless possession of the property is continued in the face of a judgment that such possession is wrongful. See, *e. g.*, *Goodyear Tire & Rubber Co. v. Marbon Corp.*, 32 F. Supp. 279 (D. Del.); *Union Nat'l Bank v. Universal-Cyclops Steel Corp.*, 103 F. Supp. 719 (W. D. Penn.); *Hammond v. Thompson*, 54 Mont. 609, 173 Pac. 229.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment below dismissing the Government's complaint and awarding affirmative judgment against the United States on the Finns' counterclaim should be reversed.

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APPENDIX A

EXHIBITS IN EVIDENCE

The following is a brief description of each of the exhibits accepted in evidence in the District Court, as described in the Government's exhibit 20 for identification:

Plaintiff's Exhibits

1. AGREEMENT dated June 25, 1946, WAA, signed by Vineland Elementary School District, Supt. Peter A. Bancroft (WAA Form 65).
2. RFC Aircraft Appraisal Sheet dated March 23, 1946, Inspected by H. A. Diekmann, Aircraft Supervisor.
4. Release of Custody of Aircraft of WAA, dated July 25, 1946, stamped "Educational Disposal" and Receipt by Vineland School.
5. Certification of Bill of Sale (photostatic copy), dated February 28, 1951, from Vineland School District to Finns.
6. Individual Aircraft Record Card.
7. Certification of Affidavit of Peter A. Bancroft (photostatic copy), dated April 14, 1951; 42-3645, reg. N111H.
9. Minutes of 1942, 1943, 1944, of Vineland Elementary School District.
10. Affidavit of Malcolm Hunter, October 22, 1954.
12. Certification of photostatic copy of Bill of Sale, dated March 28, 1951, from Vineland Elementary School District to Finns, recorded April 11, 1951 as document #545136.
13. Handwritten letter dated June 4, 1952 by Peter A. Bancroft, June 4, 1952, notarized by Special Agent Richard J. Buxton, F. B. I.
14. Letter from Mr. Frank G. Wisner, Deputy to Assistant Secretary for Occupied Areas, Department of Defense, to Mr. Larson, War Assets Administration, dated February 18, 1948.
15. Property Utilization Bulletin No. 6 by Office of Field Services, Subject: Policy and procedure regarding the utilization of aircraft excess to the needs of educational institutions.

17. Original sworn statement of Peter A. Bancroft, dated November 29, 1946.

18. Photostatic copy of copy of letter from Peter A. Bancroft to W. A. Farrell, dated April 30, 1951.

19. Photostatic copy of copy of letter from Peter A. Bancroft to W. A. Farrell, dated November 5, 1951.

Defendant Vineland's Exhibits

A. Notice for Bids, dated January 6, 1951 (Attached to its Answer).

B. Agreement, dated February 28, 1951 (Attached to its Answer).

C. Letter from Finns to Vineland School District, dated December 5, 1950.

D. Purchase Order, dated June 25, 1946, WAA Form 66 Calif. Cert Symbol 4-A-95, signed Peter A. Bancroft.

E. WAA Instructions of Office of Aircraft Disposal, Educational Aircraft Disposal Div., Washington, D. C.

F. 16 mm moving picture sound film.

G. Bill of Sale—Certificate of Title, signed by Peter A. Bancroft, Superintendent, October 9, 1950, Vineland School District.

Defendant International's Exhibits

A. Certification of true copies—(photostatic copies) of:

WAA Sales Receipt, July 10, 1946; Affidavit of Peter

A. Bancroft, dated April 14, 1951;

Bill of Sale, February 28, 1951, from Vineland School District to Finns, recorded April 16, 1951. #545613;

Original and duplicate copy of Certificate of Registration N111H, April 16, 1951, in names of Finns;

Duplicate copy of Corrected Certificate of Registration N111H, issued June 18, 1952, in names of Finns;

B. Photostatic copy of Aircraft Chattel Mortgage, dated August 31, 1951, between Finns and International.

C. Photostatic copy of Note Secured by Chattel Mortgage, dated August 31, 1951, signed by Finns to International.

D. Photostatic copy of Judgment, Nos. 599, 895 and 600,291, Superior Court, Los Angeles County; International and Finns.

E. Agreement dated August 31, 1951 between International and Finns; Exhibit A to Answer to Amended Complaint.

F. Cancelled check No. 2237 of International \$15,000 to Finns, September 1, 1951.

G. Lease of Aircraft, copy, August 31, 1951, between Finns and International.

H. Supplement to Lease, dated September —, 1951, between Finns and International.

I. Photostatic copy of Supplement to Agreement, dated September —, 1951, between International and Finns.

J. Certified photostatic copy of:

Note Secured by Chattel Mortgage dated August 31, 1951, \$15,000, signed by Finns;

Letter dated May 18, 1952 from Finns to International requesting limited custody of A/C #N111H;

Letter dated May 19, 1952 from Finns to International;

Letter dated May 20, 1952 from Finns to International.

K. Letter dated October 15, 1951 to A. J. Blackman from James B. Murray, Aircraft Title and Guaranty Corp., Washington, D. C.

L. "Re: Complete search and report on N111H \$10.00" Aircraft Title and Guaranty Corp., to A. J. Blackman.

M. Blank form of application of Civil Aeronautics Administration for certificate of registration.

N. Photostatic copy of Complaint No. 599895, Superior Court, Los Angeles County, International Airports, Inc. v. Finn, et al.

O. Photostatic copy of Affidavit for Claim and Delivery No. 599895, Superior Court, Los Angeles County, International Airports, Inc. v. Finn, et al.

P. Photostatic copy of Answer to Complaint, No. 599895, Superior Court, Los Angeles County, International Airports, Inc. v. Finn, et al.

Q. Photostatic copy of Complaint for Foreclosure of Chattel Mortgage, No. 600291, Superior Court, Los Angeles County, International Airports, Inc. v. Finn, et al.

R. Photostatic copy of Answer and Counterclaim, No. 600291, Superior Court, Los Angeles County, International Airports, Inc. v. Finn, et al.

S. Copy of Findings of Fact and Conclusions of Law, Nos. 599895 and 600291, Superior Court, Los Angeles County, International Airports, Inc. v. Finn, et al.

T. Photostatic copy of Sales Document No. 7691309, War Assets Administration to Vineland School District, March 18, 1948.

U. Certification of photostatic copies of certain aircraft records covering Curtiss-Wright aircraft, Serial No. 30225, Reg. N111E:

1. Agreement, dated June 25, 1946, executed by Vineland Elementary School District;

2. War Assets Administration Sales Document No. 7691309;

3. War Assets Administration Release of Custody of Aircraft, dated March 19, 1948;

4. Affidavit of Peter A. Bancroft, dated April 6, 1951;

5. Bill of Sale, dated March 28, 1951, from Vineland School District to Charles C. Finn and George C. Finn, recorded April 11, 1951, as document No. 545136.

Defendants Finns' Exhibits

B. RFC Agreement (photostatic copy) dated September 18, 1945 (SWPD-DP-35), Grossmont Union High School.

E. Photostatic copy of teletype dated July 10, 1946 from Heddleston, Reg. Dir., to Chief Fiscal Branch.

K. Certification of following photostats:

1. Handwritten statement by M. P. Howard, W-60, Civil Aeronautics Admn., dated April 11, 1951;

2. Affidavit of Peter A. Bancroft, dated April 14, 1951;

3. Letter dated April 16, 1951, from Edwin R. Flat-equal, Chief, Reference Service Branch, Fed. Records Center, General Services Admn., to Mrs. Marilyn H. Kelly, Asst. Chief, Records Branch, CAA;

4. Bill of Sale, dated February 28, 1951, from Vine-land School District to Finns, recorded April 16, 1951, document 545613;

5. Application for registration in names of Finns.

6. Original and duplicate copy of Certificate of Registration N111H, dated April 16, 1951, in names of Finns;

7. Message 012240Z, dated November 2, 1951, from Sixth Regional Office, CAA to W-300;

8. Copy of Message 021945Z, dated November 2, 1951, from Haldeman, CAA, to CAA, L. A.;

9. Message 051945E, dated November 5, 1951, from Sixth Reg. Office, CAA, to W-295;

10. Copy of Message 061800Z, dated November 6, 1951, from Haldeman, CAA, to CAA, L. A.;

11. Letter, dated November 5, 1951, from International to CAA, Aircraft Records Sec. A-300;

12. Aircraft Chattel Mortgage, dated August 31, 1951, executed by Finns in favor of International, recorded November 14, 1951, document 571852;

13. Copy letter, Form ACA-506, dated November 15, 1951, from Haldeman, Chief Aircraft Div., CAA, to International;

14. Letter dated March 11, 1952, from Seaboard Surety Co. to CAA;

15. Copy of Message 21200Z, dated May 21, 1952, from Robinette, CAA, to CAA, L. A.;

16. Message 282310Z, dated May 29, 1952, from Sixth Reg. Office, CAA.;

17. Copy of letter dated June 11, 1952 from Haldeman, Chief, Aircraft Engr. Div., CAA, to Seaboard Surety Co.;

18. Memo by Margaret E. O'Neill, dated June 17, 1952;

19. Letter, dated June 23, 1952, received May 26, 1952 from George C. Finn, to Margaret O'Neil, Chief, Aircraft Reg., CAA;

20. Duplicate copy Corrected Certificate of Reg. N111H, issued June 18, 1952, in names of Finns;

21. Letter dated June 18, 1952 from George C. Finn to Aircraft Records Branch, CAA;

22. Letter dated September 8, 1953 from W. T. Frazier, Chief, Surplus Property Utilization Div., Dept. of Health, Education, and Welfare, to Dept. of Commerce, CAA.

L. Copy of letter from Finns, dated January 19, 1951, to Board of Trustees Vineland School District.

S. Letter dated May 7, 1952, to Civil Aeronautics Admn., Washington, D. C., from W. T. Frazier, Prop. Utilization Coordinator, Health and Education, requesting photostatic copy of documents submitted to CAA by Finns.

X. Letter dated October 23, 1951 to Finns from Peter A. Bancroft, Vineland School District.

A-X. Bill of Sale, March 28, 1951, and Certificate of Registration N111E, Serial No. 42-96563.

APPENDIX B

STATUTES AND REGULATIONS INVOLVED

The Surplus Property Act of 1944 (58 Stat. 765) provides in pertinent part as follows:

SEC. 2. The Congress hereby declares that the objectives of this Act are to facilitate and regulate the orderly disposal of surplus property so as—

(a) to assure the most effective use of such property for war purposes and the common defense;

(b) to give maximum aid in the reestablishment of a peace-time economy of free independent private enterprise, the development of the maximum of independent operators in trade, industry, and agriculture, and to stimulate full employment;

* * * * *

(d) to discourage monopolistic practices and to strengthen and preserve the competitive position of small business concerns in an economy of free enterprise;

(e) to foster and to render more secure family-type farming as the traditional and desirable pattern of American agriculture;

(f) to afford returning veterans an opportunity to establish themselves as proprietors of agricultural, business, and professional enterprises;

* * * * *

(h) to assure the sale of surplus property in such quantities and on such terms as will discourage disposal to speculators or for speculative purposes;

* * * * *

(j) to avoid dislocations of the domestic economy and of international economic relations;

* * * * *

(m) to achieve the prompt and full utilization of surplus property at fair prices to the consumer through disposal at home and abroad with due regard for the protection of free markets and competitive prices from dislocation resulting from uncontrolled dumping;

* * * * *

(p) to foster the development of new independent enterprise;

(q) to prevent insofar as possible unusual and excessive profits being made out of surplus property;

(r) to dispose of surplus property as promptly as feasible without fostering monopoly or restraint of trade, or unduly disturbing the economy, or encouraging hoarding of such property, and to facilitate prompt redistribution of such property to consumers;

(s) to dispose of surplus Government-owned transportation facilities and equipment in such manner as to promote an adequate and economical national transportation system; and

(t) except as otherwise provided, to obtain for the Government, as nearly as possible, the fair value of surplus property upon its disposition.

* * * * *

SEC. 4 (58 Stat. 768). Surplus property shall be disposed of to such extent, at such time, in such areas, by such agencies, at such prices, upon such terms and conditions, and in such manner, as may be prescribed in or pursuant to this Act.

* * * * *

SEC. 9 (58 Stat. 769). (a) The Board shall prescribe regulations to effectuate the provisions of this Act. In formulating such regulations, the Board shall be guided by the objectives of this Act.

(b) Regulations issued pursuant to subsection (a) may, except as otherwise provided in this Act, contain provisions prescribing the extent to which, the times at which, the areas in which, the agencies by which, the prices at which, and the terms and conditions under

which, surplus property may be disposed of, and the extent to which and the conditions under which surplus property shall be subject to care and handling.

(c) Each Government agency shall carry out regulations of the Board expeditiously and shall issue such further regulations, not inconsistent with the regulations of the Board, as it deems necessary or desirable to carry out the provisions of this Act.

(d) Regulations prescribed under this Act shall be published in the Federal Register.

* * * * *

SEC. 13 (58 Stat. 770-72). (a) The Board shall prescribe regulations for the disposition of surplus property to States and their political subdivisions and instrumentalities, and to tax-supported and nonprofit institutions, and shall determine on the basis of need what transfers shall be made. In formulating such regulations the Board shall be guided by the objectives of this Act and shall give effect to the following policies to the extent feasible and in the public interest:

(1) (A) Surplus property that is appropriate for school, classroom, or other educational use may be sold or leased to the States and their political subdivisions and instrumentalities, and tax-supported educational institutions, and to other non-profit educational institutions which have been held exempt from taxation under section 101 (6) of the Internal Revenue Code.

(B) Surplus medical supplies, equipment, and property suitable for use in the protection of public health, including research, may be sold or leased to the States and their political subdivisions and instrumentalities, and to tax-supported medical institutions, and to hospitals or other similar institutions not operated for profit which have been held exempt from taxation under section 101 (6) of the Internal Revenue Code.

(C) In fixing the sale or lease value of property to be disposed of under subparagraph (A) and subparagraph (B) of this paragraph, the Board shall take into consideration any benefit which has accrued or may ac-

crue to the United States from the use of such property by any such State, political subdivision, instrumentality, or institution.

(2) Surplus property shall be disposed of so as to afford public and governmental institutions, non-profit or tax-supported educational institutions, charitable and eleemosynary institutions, non-profit or tax-supported hospitals and similar institutions, States, their political subdivisions and instrumentalities, and volunteer fire companies, an opportunity to fulfill, in the public interest, their legitimate needs.

(b) Under regulations prescribed by the Board, whenever the Government agency authorized to dispose of any property finds that it has no commercial value or that the cost of its care and handling and disposition would exceed the estimated proceeds, the agency may donate such property to any agency or institution supported by the Federal Government or any State or local government, or to any non-profit educational or charitable organization, or, if that is not feasible, shall destroy or otherwise dispose of such property.

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SEC. 15 (58 Stat. 772-73). (a) Notwithstanding the provisions of any other law but subject to the provisions of this Act, whenever any Government agency is authorized to dispose of property under this Act, then the agency may dispose of such property by sale, exchange, lease, or transfer, for cash, credit, or other property, with or without warranty, and upon such other terms and conditions, as the agency deems proper * * *

(b) Any owning agency or disposal agency may execute such documents for the transfer of title or other interest in property or take such other action as it deems necessary or proper to transfer or dispose of property or otherwise to carry out the provisions of this Act, and, in the case of surplus property, shall do so to the extent required by the regulations of the Board.

The Federal Property and Administration Services Act of 1949 (63 Stat. 377, as amended, 40 U. S. C. 471 *et seq.*) provides in pertinent part as follows:

* * * * *

SEC. 203. (a) Except as otherwise provided in this section, the Administrator shall have supervision and direction over the disposition of surplus property. Such property shall be disposed of to such extent, at such time, in such areas, by such agencies, at such terms and conditions, and in such manner, as may be prescribed in or pursuant to this Act.

* * * * *

(c) Any executive agency designated or authorized by the Administrator to dispose of surplus property may do so by sale, exchange, lease, permit, or transfer, for cash, credit, or other property, with or without warranty, and upon such other terms and conditions as the Administrator deems proper, and it may execute such documents for the transfer of title or other interest in property and take such other action as it deems necessary or proper to dispose of such property under the provisions of this title.

* * * * *

(j) (1) Under such regulations as he may prescribe, the Administrator is authorized in his discretion to donate for educational purposes in the States, Territories, and possessions without cost (except for costs of care and handling) such equipment, materials, books, or other supplies under the control of any executive agency as shall have been determined to be surplus property and which shall have been determined under paragraph 2 or paragraph 3 of this subsection to be usable and necessary for educational purposes.

(2) Determination whether such surplus property donated in conformity with paragraph 3 of this subsection is usable and necessary for educational purposes shall be made by the Federal Security Administrator, who shall allocate such property on the basis of needs

and utilization for transfer by the Administrator of General Services to tax-supported school systems, schools, colleges, and universities, and to other nonprofit schools, colleges, and universities which have been held exempt from taxation under section 101 (6) of the Internal Revenue Code, or to State departments of education for distribution to such tax-supported and nonprofit school systems, schools, colleges, and universities; except that in any State where another agency is designated by State law for such purpose such transfer shall be made to said agency for such distribution within the State.

* * * * *

(k) (2) Subject to the disapproval of the Administrator within thirty days after notice to him of any action to be taken under this subsection—

(A) The Federal Security Administrator, through such officers or employees of the Federal Security Agency as he may designate, in the case of property transferred pursuant to the Surplus Property Act of 1944, as amended, and pursuant to this Act, to States, political subdivisions, and instrumentalities thereof, and tax-supported and other nonprofit educational institutions for school, classroom, or other educational use;

(B) the Federal Security Administrator, through such officer or employees of the Federal Security Agency as he may designate, in the case of property transferred pursuant to the Surplus Property Act of 1944, as amended, and pursuant to this Act, to States, political subdivisions and instrumentalities thereof, tax-supported medical institutions, and to hospitals and other similar institutions not operated for profit, for use in the protection of public health (including research);

* * * * *

is authorized and directed—

(i) to determine and enforce compliance with the terms, conditions, reservations, and restrictions contained in any instrument by which such transfer was made;

(ii) to reform, correct, or amend any such instrument by the execution of a corrective, reformatory, or amendatory instrument where necessary to correct such instrument or to conform such transfer to the requirements of applicable law; and

(iii) to (I) grant releases from any of the terms, conditions, reservations, and restrictions contained in, and (II) convey, quitclaim, or release to the transferee or other eligible user any right or interest reserved to the United States by, any instrument by which such transfer was made, if he determines that the property so transferred no longer serves the purpose for which it was transferred, and that such release, conveyance, or quitclaim deed will not prevent accomplishment of the purpose for which such property was so transferred: *Provided*, That any such release, conveyance, or quitclaim deed may be granted on, or made subject to, such terms and conditions as he shall deem necessary to protect or advance the interests of the United States.

* * * * *

SEC. 501. All policies, procedures, and directives prescribed—

* * * * *

(b) by any officer of the Government under the Authority of the Surplus Property Act of 1944, as amended, or under other authority with respect to surplus property or foreign excess property;

* * * * *

in effect upon the effective date of this Act and not inconsistent herewith, shall remain in full force and effect unless and until superseded, or except as they may be amended, under the authority of this Act or under other appropriate authority.

Public Law 61, 84th Cong., 1st Sess. (H. R. 3322) provides in pertinent part as follows:

* * * * *

SEC. 2. (a) Subsection (j) of section 203 of the Federal Property and Administrative Services Act of 1949

is amended by adding at the end thereof the following new paragraph:

“(4) The Secretary of Health, Education, and Welfare may impose reasonable terms, conditions, reservations, and restrictions upon the use of any single item of property donated under paragraph (2) of this subsection which has an acquisition cost of \$2,500 or more.”

(b) The amendment made by subsection (a) shall apply only with respect to property donated after the date of enactment of this Act.

* * * * *

SEC. 4. (a) In the case of personal property donated or sold at a discount for educational, public health or memorial purposes, including research, under any provision of law enacted prior to the enactment of the Federal Property and Administrative Services Act of 1949, no term, condition, reservation, or restriction imposed on the use of such property shall remain in effect after the date of the enactment of this Act. This subsection shall not be deemed to terminate any civil or criminal liability arising out of a violation of such a term, condition, reservation, or restriction which occurred prior to the enactment of this Act, if a judicial proceeding to enforce such liability is pending at the time of, or commenced within one year after the enactment of this Act.

(b) No term, condition, reservation, or restriction imposed upon the use of any single item of property donated under section 203 (j) of the Federal Property and Administrative Services Act of 1949 prior to the enactment of this Act which has an acquisition cost of less than \$2,500 shall remain in effect after the expiration of the one-year period which begins on the date of the enactment of this Act. This subsection shall not be deemed to terminate any civil or criminal liability arising out of a violation of such a term, condition, reservation, or restriction if (1) such violation occurred prior to the expiration of such one-year period and (2) a judicial proceeding to enforce such liability is pending

at the time of enactment of this Act or is commenced not later than one year after the expiration of such one-year period.

* * * * *

War Assets Administration Regulation 4 (11 Fed. Reg. 5868) provides in pertinent part as follows:

SEC. 8304.1 *Definitions*—(a) *Terms defined in act.* Terms not defined in paragraph (b) of this section which are defined in the Surplus Property Act of 1944 shall in this part have the meaning given to them in the act.

(b) *Other terms.*

(1) "Aeronautical property" means personal property peculiar to aircraft, and includes but is not limited to aircraft, airframes, all spare parts of airframes, all airborne components, accessories and items of equipment which comprise complete airplanes and their spare parts, aeronautical training and instructional equipment and aids, specialized tools and equipment and tool kits used solely in aircraft maintenance and synthetic flight training devices and their spare parts. Aeronautical property does not include radios not installed in aircraft, nonheated flight clothing, life rafts and life saving devices other than personnel parachutes and such items of oxygen equipment and such navigation instruments and aids as are not normally installed in or attached to an aircraft.

(2) "Commercially unsalable property" as used herein is distinguished from property of no commercial value as used in Part 8319 of this Chapter and means property which has no reasonable prospect of sale at or above a minimum price established by the disposal agency, or where such minimum price has not been established, no reasonable prospect of sale except as salvage or scrap.

(3) "Salvage" means property that is in such a worn, damaged, deteriorated or incomplete condition, or is of such a specialized nature that it has no reasonable prospect of sale as a unit, or is not usable as a unit without major repairs or alteration. Salvage has some value in

excess of its basic material content because it may contain serviceable components or may have value to a purchaser who may make major repairs or alterations. Salvage includes used containers and cable reels.

(4) "Scrap" means property that has no reasonable prospect of sale except for its basic material content.

(5) "Instrumentality" as used herein refers to any instrumentality of a State, territory, or possession of the United States, the District of Columbia, or any political subdivision thereof, as well as such States and subdivisions themselves.

(6) "Nonprofit institutions" means any nonprofit scientific, literary, educational, public-health, public-welfare, charitable or eleemosynary institution, organization, or association, or any nonprofit hospital or similar institution, organization or association which has been held exempt from taxation under section 101 (6) of the Internal Revenue Code, or any nonprofit volunteer fire company or cooperative hospital or similar institution which has been held exempt from taxation under section 101 (8) of the Internal Revenue Code.

(7) "Educational institution or instrumentality" means any school, school system, library, college, university, or other similar institution, organization or association, which is organized for the primary purpose of carrying on instruction or research in the public interest, and which is a nonprofit institution or an instrumentality.

(8) "Public-health institution or instrumentality" means any hospital, board, agency, institution, organization or association, which is organized for the primary purpose of carrying on medical, public-health, or sanitational services in the public interest, or research to extend the knowledge in these fields, and which is a nonprofit institution or an instrumentality.

(9) "Tactical aircraft" means those generally useful only for military purposes and includes aircraft of types designed and useful only for tactical and strategic military missions, as well as such advance trainers and such

basic trainers as are not generally suitable for civilian flying.

(10) "Transport aircraft" means those which are designed to perform or can economically be converted to perform the commercial transportation of persons or property or both. This class includes single and multi-engined land aircraft, seaplanes and amphibians of 5,000 pounds gross weight and over.

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SEC. 8304.4 *Interdepartmental Advisory Committee on Surplus Aircraft Disposal.* Pursuant to arrangements made with other interested Government agencies, there is established an Interdepartmental Advisory Committee on Surplus Aircraft Disposal which shall function as an advisory committee to the Administrator and shall consist of representatives of the Department of State, the War Department, the Navy Department, the Department of Commerce, the Office of the Foreign Liquidation Commissioner, the Civil Aeronautics Board, the Reconstruction Finance Corporation, the War Assets Administration, and a representative of the Administrator, who shall serve as Chairman of the Committee. It shall be the duty of such committee to furnish advice and make recommendations to the Administrator with respect to the policies and procedures to be applied in the disposal of surplus aircraft, the allocation of aeronautical property in short supply, and all other matters relating to surplus aeronautical property upon which advice may be requested by the Administrator.

SEC. 8304.5 *Establishing minimum prices.* The disposal agency is authorized to establish minimum prices for items of aeronautical property and to treat as commercially unsalable any such property which after a reasonable test of the market it concludes cannot be sold within a reasonable period of time at prices equal to or greater than such minimum prices.

SEC. 8304.6 *Disposal of tactical aircraft.* (a) Aside from a relatively small demand for tactical aircraft to

serve specialized industrial, educational and private uses, there is no significant market for aeronautical property of this class.

(b) Tactical aircraft which have been determined to be commercially unsalable by the disposal agency shall be disposed of as salvage or scrap as hereinafter provided, or otherwise, and when disposed of other than as salvage or scrap by the disposal agency, such property shall be disposed of at fixed prices. Fixed prices for any such aircraft shall not be less than the sum of the fair market value of its usable components and the scrap value of its residual basic material.

SEC. 8304.7 *Disposal of transport aircraft.* In the disposal of transport aircraft, the disposal agency shall establish, with the approval of the Administrator fixed prices for such aircraft. In fixing such prices, the disposal agency should give consideration to the potential earning power of the aircraft in relation to other models, its estimated economical life in scheduled and non-scheduled commercial service, the degree of modification required for conversion to civilian use and the relationship between supply and demand. If the disposal agency determines that transport aircraft are beyond economical repair or that a fixed price cannot be readily established because of obsolescence, specialized design or other exceptional circumstances, such aircraft may be disposed of by competitive bidding or other method of sale considered appropriate by the disposal agency. The disposal agencies shall attempt, whenever practicable, to dispose of surplus transport type aircraft by sale rather than by lease. Transport aircraft of models approved by the Administrator, may, however, be leased by the disposal agency upon the terms approved by the Administrator; *Provided, however,* That after June 30, 1946, transport aircraft shall be disposed of only by sale.

* * * * *

SEC. 8304.11 *Disposals for educational and public purposes.*

(a) Where the disposal agency determines that any item of surplus aeronautical property is commercially unsalable, disposal may be made to educational or public-health institutions or instrumentalities as provided in this section. The disposal agency shall compile a list of such items and shall ascertain fixed prices which will reflect the benefit which has accrued or may accrue to the United States from the use of such property by educational or public-health institutions or instrumentalities. Such lists shall be submitted to the Administration, and if approved, will be published by order hereunder. The disposal agency is authorized to dispose of such property to educational or public-health institutions or instrumentalities at the prices so approved; *Provided, however,* That no such disposals at the prices so approved may be allowed to any non-profit institutions which are not exempt from taxation under section 101 (6) of the Internal Revenue Code.

(b) The disposal agency shall establish procedures pursuant to which educational or public-health institutions or instrumentalities may make written application for surplus aeronautical property available for disposal to such institutions or instrumentalities. Such procedures shall include (1) certification that the applicant is an educational or public health institution or instrumentality as defined in Section 8304.1, (2) a certification of the purposes for which the property is to be acquired, and in the case of aircraft an agreement that it will not be flown except for purposes of research or experiment in connection with the science of aeronautics, and (3) an agreement that the property will not be resold to others within three (3) years of the date of purchase without the consent in writing of the disposal agency unless it is mutilated or otherwise rendered unfit for use except as scrap.

SEC. 8304.12 *Nonprofit institutions and instrumentalities.* The price at which nonprofit institutions and instrumentalities, including educational and public-health, shall be entitled to acquire surplus aeronautical

property from the disposal agency if a price list has not been published under the preceding section, shall not be greater than the lowest price at which such property is offered other than scrap to any trade level at the time of acquisition by the nonprofit institution or instrumentality.

SEC. 8304.13 *Donation, destruction, or abandonment.* Donation, destruction or abandonment of surplus aeronautical property shall be governed by the provisions of Part 8319 of this chapter; *Provided, however,* That donations to nonprofit educational or public health institutions or instrumentalities of aeronautical property listed on any order published pursuant to Sec. 8304.11 shall not be made by owning agencies under the act of February 14, 1927 (44 Stat. 1096; 34 U. S. C. 546a) or the act of May 26, 1928 (45 Stat. 753; 20 U. S. C. 94) without the prior approval of the Administrator.

SEC. 8304.14 *Disposal as salvage or scrap.* Pursuant to arrangements reached between Reconstruction Finance Corporation, the War Department, and the Navy Department, the following procedures shall be followed with regard to domestic disposal of surplus aeronautical property as salvage or scrap:

(a) *Disposal of aircraft as salvage or scrap.*

(1) Surplus flyable aircraft which are determined by the disposal agency to be commercially unsalable may be disposed of by owning agencies as salvage or scrap unless other disposition is directed by such disposal agency; or such aircraft may be reported by the owning agency to the disposal agency, and the disposal agency shall dispose of them as salvage or scrap. Non-flyable aircraft determined by the disposal agency to be commercially unsalable shall be disposed of as salvage or scrap by owning agencies unless other disposition is directed by the disposal agency, and such aircraft should not be declared surplus by owning agencies.

(2) The disposal of flyable aircraft as salvage by owning or disposal agencies shall in each case be accompanied by a written representation from the purchaser

thereof that he is acquiring such property as salvage (*i. e.*, for salvaging by disassembly or for non-flight use) and that it will not be resold to another for purposes other than salvage. The disposal of aircraft as scrap by owning or disposal agencies shall in each case be accompanied by a scrap warranty as defined in Part 8309 of this Chapter obtained from the purchaser thereof.

* * * * *

SEC. 8304.54 *Price list for educational and public health institutions or instrumentalities.* The Surplus Property Administrator hereby approves of the list submitted by the War Assets Corporation of items of aeronautical property appearing in Exhibit A and the prices set forth therein which have been ascertained by the War Assets Corporation to reflect the benefits which have accrued or may accrue to the United States by disposal of such items to educational or public health institutions or instrumentalities.

* * * * *

<i>Catalog No.</i>	<i>Type—Symbol</i> <i>Army Navy</i>	<i>Manufacturer</i>	<i>Approved name</i>	<i>Number of engines</i>	<i>Approximate size (feet) LHS</i>	<i>Approximate shipping weight (pounds)</i>	<i>Disposal cost (each)</i>
* 42-2420-----	* C-46	* Curtiss-Wright-----	* Commando-----	* 2	* 77 x 22 x 108--	* 26,900	* \$200
*	*	*	*	*	*		*

California Statutes governing claim and delivery procedure (Cal. Code Civil Proc., secs. 509–21, 627, 667) provide in pertinent part as follows:

SEC. 509. Delivery of personal property, when it may be claimed. The plaintiff in an action to recover the possession of personal property may, at the time of issuing the summons, or at any time before answer, claim the delivery of such property to him as provided in this chapter. [Enacted 1872]

SEC. 510. Affidavit and its requisites. Where a delivery is claimed, an affidavit must be made by the plaintiff, or by someone in his behalf, showing:

1. That the plaintiff is the owner of the property claimed (particularly describing it), or is entitled to the possession thereof;

2. That the property is wrongfully detained by the defendant;

3. The alleged cause of the detention thereof, according to his best knowledge, information, and belief;

4. That it has not been taken for a tax, assessment, or fine, pursuant to a statute; or seized, under an execution or an attachment against the property of the plaintiff; or, if so seized, that it is by statute exempt from such seizure;

5. The actual value of the property. [Enacted 1872]

SEC. 511. [Seizure of property.] The plaintiff or his attorney may, thereupon, by an indorsement in writing upon the affidavit, require the sheriff, or any constable, or marshal of the county where the property claimed may be, to take the same from the defendant. [Enacted 1872; Am. Stats. 1933, p. 1856.]

SEC. 512. [Taking property of defendant: Service of affidavit, etc.] Upon a receipt of the affidavit and notice, with a written undertaking, executed by two or more sufficient sureties, approved by the sheriff, constable, or marshal receiving such affidavit and notice, to the effect that they are bound to the defendant in double the value of the property as stated in the affidavit for the prosecution of the action, for the return of the

property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may from any cause be recovered against the plaintiff, such officer must forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody. He must, without delay, serve on the defendant a copy of the affidavit, notice, and undertaking, by delivering the same to him personally, if he can be found, or to his agent from whose possession the property is taken; or, if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion, or, if neither have any known place of abode, by putting them in the post office, directed to the defendant. [Enacted 1872; Am. Stats. 1901, p. 135 (unconstitutional); Stats. 1933, p. 1856.]

SEC. 514. [Defendant may retain property by giving undertaking.] At any time before the delivery of the property to the plaintiff, the defendant may, if he do not except to the sureties of the plaintiff, require the return thereof, upon giving to the officer making the service, a written undertaking, executed by two or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the defendant. If a return of the property be not so required within five days after the taking and service of notice to the defendant, it must be delivered to the plaintiff, except as provided in section 519. [Enacted 1872; Am. Stats. 1933, p. 1857.]

SEC. 518. [Sheriff, etc., to hold property.] When the sheriff, constable, or marshal has taken property as in this chapter provided, he must keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his fees for taking and his necessary expenses for keeping the same. [Enacted 1872; Am. Stats. 1933, p. 1857.]

SEC. 521. [Protection of plaintiff in possession of property.] After the property has been delivered to the plaintiff as in this chapter provided, the court shall, by appropriate order, protect the plaintiff in possession of said property until the final determination of the action. [Added by Stats. 1913, p. 555.]

SEC. 627. [Verdict in actions for recovery of specific personal property.] In an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff, or the defendant, by his answer, claim a return thereof, the jury, if their verdict be in favor of the plaintiff, or, if being in favor of defendant, they also find that he is entitled to a return thereof, must find the value of the property, and, if so instructed, the value of specific portions thereof, and may at the same time assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the taking or detention of such property. [Enacted 1872; Am. Code Amdts. 1873-74, p. 311.]

SEC. 667. [Judgment in replevin for possession or value of property and damages: Judgment payable in specified kind of money or currency: Statement that defendant is subject to arrest.] In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession or the value thereof, in case a delivery cannot be had, and damages for the detention. If the property has been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for a return of the property or the value thereof, in case a return cannot be had, and damages for taking and withholding the same. In an action on a contract or obligation in writing, for the direct payment of money, made payable in a specified kind of money or currency, judgment for the plaintiff, whether it be by default or after verdict, may follow the contract or obligation, and be made payable in the kind of money or currency specified therein; and in all actions for the recovery of money, if the plaintiff allege in his

complaint that the same was understood and agreed by the respective parties to be payable in a specified kind of money or currency, and this fact is admitted by the default of the defendant or established by evidence, the judgment for the plaintiff must be made payable in the kind of money or currency so alleged in the complaint; and in an action against any person for the recovery of money received by such person in a fiduciary capacity, or to the use of another, judgment for the plaintiff must be made payable in the kind of money or currency so received by such person.

Where the defendant is subject to arrest and imprisonment on the judgment, that fact must be stated in the judgment. [Enacted 1872; Am. Stats. 1933, p. 1882.]

No. 14770

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

GEORGE C. FINN, CHARLES C. FINN, INTERNATIONAL AIR-
PORTS, INC., a Corporation, PETER A. BANCROFT and VINE-
LAND ELEMENTARY SCHOOL DISTRICT OF KERN COUNTY,

Appellees,

and

VINELAND ELEMENTARY SCHOOL DISTRICT OF KERN
COUNTY, CALIFORNIA,

Appellant,

vs.

UNITED STATES OF AMERICA, GEORGE C. FINN, CHARLES C.
FINN, and INTERNATIONAL AIRPORTS, INC.,

Appellees.

APPELLANT VINELAND'S OPENING BRIEF.

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UNITED STATES OF AMERICA, GEORGE C. FINN, CHARLES C.
FINN, and INTERNATIONAL AIRPORTS, INC.,

Appellees.

APPELLANT VINELAND'S OPENING BRIEF.

Opinion Below.

The opinion below may be found in 127 Fed. Supp. 158
and R. 125-142.

Jurisdiction.

The jurisdiction of the District Court rested on 28
U. S. C., Section 1345. A judgment was entered by the
District Court on February 8, 1955. [R. 125-142.] No-
tice of appeal was filed by Appellant herein May 27, 1955.
[R. 994.] The jurisdiction of this Court rests on 28
U. S. C. 1297.

Questions Presented.

Whether conditions precedent existed the performance of which were necessary prior to passage of right, title and interest in that certain C46A aircraft N111H (hereinafter referred to as aircraft in suit or subject aircraft) from Appellant to Appellees Finn, whether such conditions precedent were performed and whether therefore Appellant was and is entitled to immediate possession of the aircraft in suit and the owner thereof.

Whether, assuming for the purposes of this question that the conditions of the sale were conditions subsequent, said sale was nonetheless a conditional sale, the conditions of which have not been performed and for which Appellant had and has a right to immediate possession to the aircraft in suit and is the owner thereof.

Specifications of Error.

1. The Court erred in that portion of the judgment which holds that Appellant sold, Transferred and delivered to Appellees Finn all of its right, title and interest in and to the aircraft in suit on February 28, 1951. [R. 160(2).]

2. The Court erred in finding and concluding that Appellant sold, transferred and delivered to Appellees Finn all of its right, title and interest in and to the aircraft in suit. [Findings, R. 150(3); Conclusion, R. 156 (2).]

The Court erred in those portions of the Judgment, findings of fact and conclusions of law which purport to hold, find or conclude that any party to the subject suit

has any right, title or interest or right to immediate possession which is prior to that of Appellant. [Judgment, R. 160-162; Findings, R. 150(2), 154(15), 155(18); Conclusion, R. 156(2); 157.]

Statement.

This action was instituted by Appellee United States for declaratory relief, breach of contract and claim and delivery, alleging ownership and right to immediate possession in the aircraft in suit. Appellee United States also alleged damages for breach of contract against Appellant and against Defendant Bancroft, Superintendent of the Appellant School District, for inducing breach of contract.

On or about the 25th day of June, 1946, defendant Peter A. Bancroft executed a purchase order, No. 101, WAA Form 66 [Vineland's "Exhibit D"], which included one (1) C-46 Curtis Commando, Catalog No. 42-2420, said aircraft being the subject C-46 N111H, No. 23645.

On or about June 25, 1946, Peter A. Bancroft executed a WAA Form 65 [Pltf. "Exhibit 1"] purporting to act as the authorized agent of the Appellant, providing for the transfer of the subject C-46 N111H, No. 23645, from the United States Government to Appellant under provisions of Surplus Property Act of 1944, Public Law 457.

On or about the 10th day of July, 1946, R. F. Bates executed in behalf of the Federal Government a sales receipt to Peter A. Bancroft [Deft. Finns' "Exhibit J"],

in the sum of Three Hundred Dollars (\$300) in full payment for the purchase of one (1) AT-6 and one (1) C-46, and said C-46 is the subject Curtis Commando N111H, No. 23645.

On or about the 25th day of June, 1946, in Ontario, California, the United States Government released custody of said aircraft to J. D. Poole, and the Federal Government duly executed a "Release of Custody of Aircraft" Form 1316. S.W.P.D.—B.P. [Pltf. "Exhibit 4"], on said date.

On or about the 25th day of July, 1946, said aircraft was flown from Ontario, California, to a field adjoining the Sunset School, which is a school owned, operated and maintained by Appellant in the County of Kern, State of California; and said aircraft remained at said location until on or about the 15th day of August, 1952, and was used by Appellant for educational purposes.

Pursuant to an offer made by Appellee Finn to purchase the subject C-46 aircraft from Appellant in December of 1950, the Appellant, by and through its duly elected and qualified board of trustees, did call and advertise for the reception of bids for the disposal of the subject aircraft to the highest bidder.

Said notice [Vineland's "Exhibit B," R. 57], was duly and properly published according to law; and that said notice called to the attention of all bidders that said aircraft was acquired by Appellant from the United States Government and War Assets Administration and was subject to restrictions on use; and that the successful bidder would

be required to secure releases of said restrictions from the proper agency of the United States.

On or about the 22nd day of January, 1951, Appellees Finn submitted a bid to Appellant for the purchase of subject aircraft, said bid was accepted by the Appellant; and that in said bid Appellees Finn expressly agreed to secure the consent of the Government of the United States to the sale of said C-46 aircraft, and to secure a waiver from any and all proper governmental agencies of any and all restrictions on the use of said aircraft existing by virtue of any Federal law or by virtue of any agreement between the Appellant and the United States Government or agency thereof.

On or about the 28th day of February, 1951, Appellant and Appellees Finn did enter into a written agreement concerning the said C-46 aircraft [Vineland's Exhibit B, R. 59]; that in said agreement it was expressly agreed, and it was the intention of all parties thereto, that the transfer of title, possession and use of said aircraft was subject to said Appellees Finn obtaining the consent of the United States Government and related governmental agencies thereto to the subject sale and use of said aircraft; and it was also pointed out in said agreement, and was the intention of the parties, that any transfer of said C-46 aircraft was subject to any and all restrictions imposed by the United States Government concerning the use and sale thereof.

Said agreement contemplated the acquisition and furnishing of materials and the performance of labor, as

well as the payment of cash in consideration for the subject aircraft.

Appellees Finn obtained a registration certificate from the Civil Aeronautics Authority to said aircraft and that said Appellees Finn represented to Peter A. Bancroft that consents had been obtained in accordance with the contract between the Finns and the Appellant, and that the request for possession of said aircraft by Appellees Finn was for the purpose of obtaining work and materials on and for said aircraft which could not be obtained or done at the Sunset School, and that the use by Appellant of said plane for educational purposes was not to be interfered with, and that the plane would be returned if all the conditions of the agreement between Appellant and the Finns were not complied with.

On or about the 15th day of August, 1952, Appellees Finn thus obtained possession of the subject aircraft and flew said aircraft from the Sunset School location to the Kern County Airport in Bakersfield, California.

Thereafter on or about October 25, 1951, Appellees Finn transferred said aircraft from Bakersfield to Lockheed Air Terminal, Burbank, California where Appellee International Airports bestowed labor and materials, upon said aircraft for which they claim a lien.

Appellee International Airports, Inc., had notice and knowledge of the interests and claims of Appellant to the subject C-46 aircraft, which notice and knowledge was acquired prior to the making of any agreement between the Appellees Finn and Appellee International Airports,

Inc., and had knowledge of the terms and conditions, as set forth in that agreement existing between Appellant and Appellees Finn, with respect to said aircraft, and that this knowledge was obtained by the Appellee International Airports, Inc., prior to its parting with any consideration concerning said aircraft.

In May of 1952, Appellees Finn returned said aircraft to Bakersfield, California at the request of Appellant where on September 18, 1952, the United States Marshal, acting pursuant to claim and delivery process issued on behalf of Appellee United States took possession of the aircraft in suit until October 13, 1952, when he delivered said aircraft to Appellee United States. The Government retained possession thereof until January 18, 1953, when Appellees Finn without permission of the Appellants or Government, took possession of said aircraft and retained possession thereof until February 1, 1953, when Appellee United States again took possession of said aircraft at Scotty's airstrip in the State of Nevada.

Trial was had and Judgment entered [R. 159], Findings and Conclusions filed. [R. 148-159.] Appeal has been taken by the Appellant only from a portion of the judgment, findings of fact and conclusions of law as indicated hereinabove under "Specifications of Errors."

ARGUMENT.

I.

The District Court Erred in Failing to Rule That in Accordance With the Agreement [Vineland's Ex. B, R. 59] and Documents Related Thereto Between Appellant and Appellees Finn, Right, Title and Interest to the Aircraft in Suit Did Not Pass to Appellees Finn Until All Conditions Precedent of Said Agreement and Documents Should Be Performed by Appellees Finn; and in Not Adjudging That Said Conditions Precedent Had Not Been Performed and That, Therefore, the Appellant Was Entitled to Immediate Possession of the Aircraft in Suit, and Was the Owner of All Right, Title and Interest Thereto.

The subject agreement, "Notice for Bids" [R. 57], bid accepted [Finn Ex. "L"], and testimony in connection therewith clearly indicated that in connection with the subject sale, conditions precedent were contemplated, set forth, and intended by the parties prior to the passage of right, title and interest to the subject aircraft to Appellees Finn.

A. The terms of the subject agreement clearly indicate the existence of a condition precedent to transfer of right, title and interest in that in Paragraph 4 [R. 62] of said agreement it is clearly indicated that "This agreement is *contingent* upon Contractors' ability to secure the necessary clearances from the Government. . . . Therefore, notwithstanding any other provisions in this agreement. . . ." (Emphasis ours.) The word "contingent" in said agreement makes it clear that there are such condi-

tions precedent to the very existence of the agreement itself and “notwithstanding” any other provisions in the agreement which may appear to the contrary. Therefore, although there appear to be provisions transferring immediate right, title and interest to the aircraft in suit in said agreement [Par. 1 of said Agreement, R. 60], it is clear from the face of the agreement itself that a condition precedent was intended, particularly on the matter of first obtaining clearances of the Government of any restrictions on the use and possession of the subject aircraft.

B. That a condition precedent was and could be the only intention of the parties to the agreement is clear since in order for the agreement to be legal and proper it must contain the same provisions and conditions that appeared in the “Notice for Bids” and the bid which was accepted by the school district. [See *Ryan v. Ashbridge*, 10 Pa. Dist., R. 153, 160, 161; *Miller v. McKinnon*, 20 Cal. 283.] Said Notice for Bids and the bid which was accepted by the school district clearly indicated that the successful bidder would be required to secure necessary releases of restrictions on the use of the aircraft in suit from the Federal Government. The law is clear that the actions of a public agency are presumed to have been done in accordance with the law. Presuming that the agreement was legally entered into by the school district, we must presume that the requirements of the “Notice for Bids” were also placed in the subject agreement. We must therefore find that the conditions precedent of

obtaining releases to restrictions on the subject aircraft from the United States prior to the transfer of the right, title and interest to the aircraft in suit to Appellees Finn as indicated by the "Notice for Bids" was transferred into the agreement as a condition precedent. To hold otherwise would be to hold that the governing board acted illegally in not providing the same terms and conditions in the agreement that were provided for in the "Notice for Bids" and the bid as accepted, which would mean that the agreement as entered into would be illegal and void.

C. A passage of title to the subject aircraft after the performance of certain conditions precedent was the only legal method wherein the school district could properly sell the subject aircraft. To find that title passed prior to the performance of the conditions of the subject sale, *i.e.*, payment of money, performance of service and furnishing of materials, would be to recognize that the school district had *lent the credit* of the district to Appellees Finn in connection with the subject sale. We must presume that the school district knew its legal bounds and acted in accordance therewith. It must therefore be presumed that a condition precedent was intended and was a part of said agreement, or in the alternative it must be determined that said agreement was illegal and void.

1. The lending of the public credit by a school district is unconstitutional. (Cal. Const., Art. IV, Sec. 31.)

D. At first glance there would appear to be an ambiguity in the terms of the subject agreement concerning the

time for the passage of right, title and interest of the subject aircraft. However, when the agreement is read in its entirety and with the "Notice for Bids," and the testimony of the parties is considered as to their intent, it is clear that a condition precedent was both intended and in fact exists. The law is clear that where an ambiguity exists in the terms of a contract the Courts will look to the intent of the parties, and parol evidence may be used to explain the ambiguity. (*Buckbee v. Hodenadel Co.*, 224 Fed. 14, 139 C. C. A. 478, L. R. A. 1916C 1001; Williston, Contracts, Sec. 613.)

1. Uncontradicted testimony of the Chairman of the Board of Trustees (Johnson) and the Superintendent of the school district (Bancroft) at the trial of this action indicated that the intent was that the conditions of the subject agreement and related documents were to be precedent to passage of title. [See R. 519, 522, 528-530, *re* Bancroft's testimony; R. 601-603, *re* Johnson's testimony.]

2. The jury found in its special verdict, in answer to Interrogatory No. 2 [R. 112], that the school district did not intend to transfer title to the airplane in suit to Appellees Finn at any time before all necessary consents and releases and waivers of the Government had been procured. The Court in its Memorandum of Decision adopted the findings of the jury as its own. [R. 127.]

a. Consistent with this intention of a condition precedent and as further evidence thereof is the fact that when physical possession of the aircraft in suit was released to Appellees Finn the District Super-

intendent and the Appellant intended that such possession was solely for the purpose of having work done upon said aircraft which could not be done on school district grounds.

(1) The jury so found in its special verdict in answer to Interrogatory No. 7 [R. 113], which finding was adopted by the Court in its Memorandum of Decision.

(2) The testimony of Appellees Finn and their *actions* in returning the subject aircraft to Bakersfield from Lockheed Air Terminal in May of 1952 at the request of the school district's counsel [see R. 474-475] is further uncontradicted evidence of the intention of both Appellees Finn and Appellant that the aircraft was merely flown to Los Angeles for the sole purpose of having work done thereon and that the transfer of right, title and interest in and to said aircraft was not to occur until all conditions in connection with the subject agreement and surrounding documents had been complied with.

(3) Testimony of the District Superintendent and the Chairman of the Board of Trustees also indicates the intention of the school district and the Superintendent in connection with the release of physical possession of the subject aircraft. [R. 574-575, *re* Bancroft; 601-603, *re* Johnson.]

E. The evidence presented in the District Court clearly shows that the conditions of the subject agreement and related documents have not been performed:

1. Purchase price for said aircraft has not been paid. [R. 473, 487-489.]

2. Work has not been completed and materials have not all been furnished. [R. 473, 487-489.]

3. Consents, releases and waivers by the Federal Government were not obtained. [Special verdict of jury in answer to Interrogatorys Nos. 14, 15; R. 116, 117.]

F. Appellee International Airports, Inc., acquired no right in such airplane as against the Appellant.

1. "An owner of personal property has the right to make an agreement to sell the same and deliver possession thereof to the buyer upon the condition that the title thereto shall, nevertheless, remain in the seller until the price agreed on has been fully paid or other conditions relating to the sale be performed, and the title so withheld by the owner will, until full payment, be superior to that of a subsequent mortgagee or purchaser of such personal property from the buyer, even if such subsequent mortgage or purchase was made without knowledge or notice of the reservation of title." (*Oakland Bank of Savings v. Calif. Pressed Brick Co.*, 183 Cal. App. 295, 297, 191 Pac. 524; *Phelps v. Loupias*, 97 Cal. App. 2d 350.)

2. Defendant International Airports, Inc., had both knowledge and notice of Appellant's interests and claims to the subject aircraft at the time of advancing money on said aircraft to Appellees Finn and also when labor was performed on and materials were furnished to Appellees Finn for the subject aircraft. [See special verdict of jury in answer to Interrogatories Nos. 10 and 11, R. 114 and 115.]

II.

The District Court Erred in Failing to Rule That the Agreement [Vineland's Ex. B; R. 59] and Documents Related Thereto Between Appellant and Appellees Finn Was a Conditional Sales Contract, and That a Condition or the Conditions Thereof Had Not Been Performed by Appellees Finn and in Not Adjudging That Therefore the Appellant Was Entitled to Immediate Possession of the Aircraft in Suit and Was the Owner of All the Right, Title and Interest Thereto.

Assuming for the purposes of this argument that the Court determines that a condition precedent does not exist to the said sale of the subject aircraft, it clearly appears from the subject agreement, Notice of Bids, other documents, and testimony in this action that a conditional sales contract was contemplated, and that the conditions set forth in said documents were, at least, conditions *subsequent*, and that a breach of such a condition or conditions would give the Appellant a right to repossess the subject aircraft and that the legal right, title and interest thereto remained in the school district until such time as all conditions of the agreement, Notice for Bids, bid accepted, and other documents had been complied with.

A. One who sells property under a conditional sale does not have a mere lien on the property, but retains the title thereto and merely gives the conditional right of possession to the buyer, who may acquire title only by performing the obligations expressed in the contract. (*Phelps v. Loupias*, 97 Cal. App. 2d 350, 217 P. 2d 748.)

B. A conditional vendee is in the position of a mere possessor. (*Phelps v. Loupias, supra*; *Bice v. Harold N. Arnold, Inc.*, 75 Cal. App. 629, 243 Pac. 468; *Guerin v. Kirst*, 33 Cal. 2d 402, 202 P. 2d 10.)

C. "While an agreement contains no express retention of title on the part of the seller, or words of surrender or cancellation in the event of default of payments, nevertheless, whether or not the contract is one of conditional sale, reserving the title in the seller, or one transferring title to the buyer, is primarily a question of intention." (*Bailey v. Looch, supra.*)

D. "The question whether an agreement relating to the sale of personal property is merely an agreement to sell or a consummated sale and transfer of title may not always be determined from the language of the instrument itself, but reference must often be made to the intention of the parties and the surrounding circumstances." (*Katz v. People Finance and Thrift Company*, 101 Cal. App. 552.)

1. Uncontradicted testimony indicates clearly that a conditional sales contract was intended by the parties to the subject agreement, Notice of Bids, and bid accepted. [R. 519, 522, 528-530 *re* Bancroft; R. 601-603 *re* Johnson.]

2. Special verdict of jury in answer to Interrogatories Nos. 2 and 7 [R. 112 as to No. 2 and R. 113 as to No. 7], which findings were adopted by the Court as its own. [R. 127.]

3. Actions and testimony of Appellees Finn concerning return of aircraft to Bakersfield at request of school district's counsel. [R. 474-475.]

4. The terms of the subject agreement clearly indicate on its face the intention that such an agreement is to be a conditional sales contract wherein it provides in Paragraph 4 of said agreement [R. 62] that "This agreement is *contingent* upon Contractors' ability to secure the necessary clearances from the Government . . . Therefore, *notwithstanding* any other provisions in this agreement" (Emphasis ours.)

5. For a more thorough discussion and examination of testimony and documents indicated in Paragraphs 1, 2, 3 and 4, above, see Appellant's argument herein concerning conditions precedent.

E. Since the conditions in the agreement, Notice for Bids, and bid accepted concerning said sale between Appellant and Appellees Finn, requiring that releases, waivers and consents be obtained by Appellees Finn from the United States have not been complied with by Appellees Finn, and many of the conditions requiring payment of cash, work and materials to be furnished have not been performed (see discussion *re* conditions precedent, Par. E, 1, 2 and 3, pp. 12-13, hereof), title to such airplane was never passed to Appellees Finn, and Appellant is therefore entitled to immediate possession of the subject aircraft.

F. Appellee International Airports, Inc., acquired no right in such airplane as against Appellant for the same reasons as set forth in Paragraph F, 1 and 2, page 13, hereof.

Conclusion.

It is submitted that the judgment should be reversed as to those matters set forth in the specifications of error in this brief and affirmed as to all other matters.

Respectfully submitted,

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No. 14770

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Appellees.

BRIEF OF APPELLEES VINELAND SCHOOL DISTRICT AND PETER BANCROFT.

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No. 14770

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

GEORGE C. FINN, CHARLES C. FINN, INTERNATIONAL AIR-
PORTS, INC., a Corporation, PETER A. BANCROFT and VINE-
LAND ELEMENTARY SCHOOL DISTRICT OF KERN COUNTY,

Appellees,

and

VINELAND ELEMENTARY SCHOOL DISTRICT OF KERN
COUNTY, CALIFORNIA,

Appellant,

vs.

UNITED STATES OF AMERICA, GEORGE C. FINN, CHARLES C.
FINN, and INTERNATIONAL AIRPORTS, INC.,

Appellees.

BRIEF OF APPELLEES VINELAND SCHOOL DISTRICT AND PETER BANCROFT.

Opinion Below.

The opinion below may be found in 127 Fed. Supp.
158 and R. 125-142.

Jurisdiction.

The jurisdiction of the District Court rested on 28
U. S. C., Section 1345. A judgment was entered by the
District Court on February 8, 1955. [R. 125-142.] Notice
of appeal was filed by Appellant herein April 13, 1955.
[R. 180.] The jurisdiction of this Court rests on 28
U. S. C. 1297.

Statement.

The statement presented by this Appellee in its Appellant's Brief (Appellant Vineland's Op. Br.) was an endeavor to set before the Court a concise statement of the relevant facts necessary to a determination of this action without quoting portions of documents, exhibits or law therein which would color those facts in favor of any party. The fact statement as presented in "Appellant Vineland's Opening Brief," pages 3-7, is hereby incorporated in this brief as if fully set forth herein.

The remainder of this statement will be used in clarification of the facts indicated by the Government in its "Statement." (Brief for the United States, pp. 3-13.)

The Government in its statement in the middle of page 3 of its brief quotes portions of Vineland's Exhibit "E," instructional circular, but neglects to quote a portion of said exhibit in connection with the disposal of aircraft to schools, which states as follows: "Distribution under this plan will be confined to aeronautical property which has been determined by the disposal agency to be commercially unsalable by reason of its condition resulting from damage, wear, obsolescence, or otherwise, has no reasonable prospect of sale except as scrap, or with respect to which by reason of its large supply or prior use the estimated cost of care, handling and disposal will exceed the estimated proceeds unless it is promptly sold as scrap, or with respect to which the estimated cost of care, handling and disposal will exceed the estimated

proceeds as scrap, or otherwise.” It is to be noted that the aircraft in suit is listed on said exhibit.

WAA Form 65 as executed speaks for itself in its entirety as to what it contains concerning both the Government and the school district. This Appellee will not attempt in this statement to answer the Government’s statement by pointing out portions of said agreement which the Government has failed to quote in its summary of contents. (Govt. Br. pp. 3-4.)

The Government’s statement (Br. p. 4), indicates a market value of the subject aircraft at the time of transfer to Vineland of Five Thousand Dollars (\$5,000). The attention of the Court is drawn to the determination of the Government at the time of the sale that the subject aircraft was “commercially unsalable”. [Vineland’s Ex. E; R. 509.] Also the Five Thousand Dollar (\$5,000) value was the purported value of the aircraft in 1947 and 1948, not 1946, as indicated by the Government’s reference to the record in this connection. [R. 281, 300.] It is also to be noted that said Five Thousand Dollars (\$5,000) value is an aircraft without restrictions upon it. The subject aircraft with whatever restrictions were reputed to be on such aircraft in 1946 was only of the value of its metal. [R. 299, 418-419, 413-414.] Even without restrictions it had no value. [R. 895.]

The Government in its statement on page 5 at the end of the top paragraph therein states: “No other document in the nature of a bill of sale or a certificate of title was ever issued to Vineland.” The Court’s atten-

tion is called to "Sales Receipt," International's Exhibit A(1) and the argument presented herein (*infra*, IV, pp. 44-53) as to whether or not said "Sales Receipt" and other documents were in the nature of a "bill of sale." [R. 375.]

The Government in its statement (Br. pp. 5-8), (see also "Argument" Brief for United States, p. 54), repeatedly draws to the Court's attention the fact that Vineland recognized restrictions with respect to the subject aircraft and did so in its agreement with Defendants Finn [Vineland's Ex. B; R. 59] and Notice for Bids. [Vineland's Ex. A; R. 57.] Not only are the implications contained thereon unfounded in the evidence but clearly are not appropriate innuendo to place in a brief before this Court. The district is to be commended for placing in any agreement or notice for bids for the sale of the subject aircraft the necessity for the consent of the Government for removal of any restrictions which may or may not exist, this action by the district obviously occurring out of a spirit of cooperation toward the Federal Government, a overzealous desire to do any and all things proper under the circumstances, and an abundance of caution.

ARGUMENT.

I.

Restrictions Against Flight Use and Resale of the Subject Aircraft Contained in the Executed WAA Form 65 Are Invalid. The Appropriate Regulation and Statutes Must Be Read Into the Agreement.

A vital part of the decision of the lower court concerns these two basic propositions: first, the validity of restrictions in the executed WAA Form 65 Agreement [R. 15-16] when compared to Regulation 4, Section 8304.11 (b)(2)(3), of the War Assets Administration (32 C. F. R. 1946 Supp.); second, whether or not the subject restrictions in Regulation 4 are valid when compared to the Surplus Act of 1944 (58 Stat. 765).

A. The provisions of the Form 65 Agreement concerning restrictions on flight uses and resale of the subject aircraft were invalid when compared to the appropriate Regulation 4 in that said restrictions, as they appeared in Form 65, were "clearly inconsistent and erroneous."

1. The District Court pointed out in its decision [R. 132-134] that the appropriate Regulation 4 (C. F. R. 1946 Supp., Sec. 8304.11(b)) restricted the disposal agency, in its procedures, in disposing of surplus aeronautical property to a public institution. The Court clearly indicates such procedures were mandatory on the disposal agency in that the Regulation provided they *shall* include "(2) a certification . . . of the purposes for which the

property is to be acquired, and, in the case of aircraft, an agreement that it will not be flown except for purposes of research or experiment in connection with the science of aeronautics, and (3) an agreement that the property will not be resold to others within three (3) years of the date of purchase without the consent in writing of the disposal agency unless it is mutilated or otherwise rendered unfit for use except as scrap." The executed WAA Form 65 Agreement, on the other hand, prohibited entirely any and all flight use, including flight for research and experimental purposes, and also said Form 65, as executed, indicated that the restrictions were to be enforceable for all time and would not lapse in three (3) years as demanded by the appropriate Regulation. These discrepancies were not only in violation of Regulation, but also the Surplus Property Act itself. (*Infra*, par. I, B, pp. 12-25.) It must be presumed the regulatory body, in adopting appropriate Regulation 4, knew this, thus these provisions were inserted not as mere minimums, but mandatory maximums. (*Infra*, I, A, 5, (2) (a), pp. 10-12.)

2. As pointed out by the Court, and herein, the language of the Regulation is mandatory, and thus the Regulation must control the subject WAA Form 65 Agreement to the extent authorized by the statute. *United States ex rel. Accardi v. Shaughnessy*, 347 U. S. 260 (1954); [R. 134].

3. When the background of former agreements and regulations, out of which the WAA Form 65 Agreement was drafted by the disposal agency, is considered, it can be seen that the inconsistency be-

tween said Agreement and the Regulation occurred out of oversight or error on the part of the Government.

a. The executed WAA Form 65 Agreement was based upon an earlier form of agreement, No. 35 [Finns Ex. "B"], which was used by the Reconstruction Finance Corporation for the disposal of aircraft for educational purposes. The Regulation in force at the time of the adoption of the Form 35 Agreement was Regulation 4, 10 F. R. 5460, which contained more strict restrictions on flight use and resale in Section 8304.4:

“(c) the Buyer shall file with the Disposal Agency a certificate under oath, duly notarized that such buyer is an educational institution, as defined in Section 8304.1(e), that the property is being acquired to be used only for non-flight instructional, research or experimental purposes; that it will not be used for any flight purposes, and that the property will be disposed of only for scrap and only after it shall have been rendered completely unfit and useless except for its basic material content.’ The Form 35 Agreement adopted the exact language of said Regulation. It may be seen in inspection and the testimony in this case that the language of the old Regulation and the old Form 35 Agreement [Finn Ex. B] was carried over into the WAA Form 65 Agreement, either intentionally, or in all probability inadvertently or in error. [R. 379-382.]

Thus, the executed Form 65 Agreement provides:

“That all acquired property, when unfit for the above purpose, will be sold only as scrap and then only after it shall have been rendered completely unfit and useless except for its basic material con-

tent. Sales consummated within three years of the date of acquisition must have the prior approval of the Disposal Agency.”

b. To allow a disposal agency to carry over provisions of an old regulation which has been amended out by a new regulation, would be allowing a disposal agency to act beyond its statutory powers. A disposal agency cannot continue an old regulation in effect after said regulation has been amended or otherwise changed by the regulatory body, unless clearly and expressly authorized to do so by said regulatory body. The Government argues in its brief that the disposal agency is given broad discretion which is, of course, true, but if such be the case here, there would have been no reason for the change in the regulation having ever been made. It is conceivable that the regulatory body, in changing Regulation 4, in 1945 and 1946, making it more liberal (providing for flight use and resale after three years) did so on advice of counsel or their own determination that to provide otherwise was contrary to the objectives of the Surplus Property Act of 1944 (*infra*, I, B, pp. 12-25). Therefore, this is not a mere situation of a disposal agency entering into an agreement which is more to the advantage of the Federal Government, as has been argued by the Government (Govt. Br. pp. 35-36) in this action, but is a situation where a disposal agency has clearly violated a mandatory regulation and through inadvertence, or intentionally, has carried the provisions of an old regulation to a new form agreement, while purporting to comply with the new regulation.

4. The instant case also is not a mere situation where an interpretation of the administrative agency concerning an "ambiguity" must be accepted, as the Government argues in its brief (p. 40) but is such an error and inconsistency that it will be difficult to match in the future eras of Administrative confusion.

5. It would have been sufficient for the District Court to stop at this point in its decision and find that the resale of the subject aircraft by Vineland to the Finns was in accordance with the Regulation, inasmuch as said resale occurred after a holding of said aircraft by the Vineland School District for a period of four years and the regulation clearly indicates only three years was necessary. The District Court, however, did not stop at this point and went on to point out the violations by the regulatory body of the objectives of Congress set forth in the Surplus Property Act of 1944, when said regulatory body placed the subject restrictions in its Regulation. [R. 135-136.] These violations are so clear, the District Court could hardly ignore them. Before taking up the Court's decision concerning the restrictions in the Regulation and their invalidity when compared to the objectives of the Surplus Property Act, this Appellee shall, in the next few paragraphs, concern itself with the subject three year provision of the Regulation. The District Court in considering the three year provision concludes in its decision [R. 136] as follows:

"The three-year restriction on unfettered disposal having expired at the time of the sale to defendants Finn, the School District was free to sell the aircraft as such without violating the provisions of subsection

(3) of the regulation. (See *United States v. School District, et al.*, No. 1107 (E. D. Mich. 1954).)”

a. Regulation 4, Section 8304.11(b), as amended May 21, 1946, makes it *mandatory* upon the disposal agency to adopt an agreement which includes the material set forth in subdivision (3) thereof. Said subdivision (3) provides: “(3) an agreement that the property will not be resold to others within three (3) years of the date of purchase without the consent in writing of the disposal agency unless it is mutilated or otherwise rendered unfit for use except as scrap.” The regulatory body clearly indicates an intention that after the three year period from the date of purchase, the property may be sold by the education institution for *any purpose* without the necessity of the consent of the disposal agency, and within the three year period the property may be sold if mutilated by said agency or otherwise rendered unfit for use, except as scrap.

(1) If said Regulation, subdivision (3), were to be interpreted as it appears in the WAA Form 65 Agreement, and as the Government would have us to believe it should be interpreted in this action, there would have been no reason for the regulatory body to place the 3 year period in said section (see *supra*, *re* inconsistency).

(2) A time limitation on the subject restrictions was also necessary to the very validity of the regulation when compared to the statute, and consequently, to the validity of such clauses in an agreement.

(a) For the purposes of this argument we will set aside for the moment the District Court’s finding

that any restrictions on flight use and resale in the regulation were invalid and accept (without conceding) the Government's argument that some limitation on educational use was necessary to guarantee the Government its fair value in "benefits" by a reasonable period of educational use.

Since it must be presumed that the regulatory body, in adopting restrictions in regulations, intended and did act in accordance with the law, where an ambiguity or interpretation of intent is necessary in construing a regulation the interpretation which most closely accords to the law (here the objectives of the statute) must be adopted. Thus the subject regulation must be construed so as to give effect to as many of the objectives and guides of the Surplus Property Act of 1944 as is possible under the circumstances. Conversely, any interpretation of the regulations of the regulatory body which do not meet those objectives and guides, or as many of them must be disregarded.

In the instant case it appears clear, upon examining the many objectives of the Surplus Property Act and reconciling the conflicts that appear therein, and with requirements of educational disposal, that the regulatory body intended and reached a determination that a three-year period for restricted holding by public agencies was all that was necessary to repay the Government in education benefits (*infra*, I, B, 1, b, and c, pp. 14-25). At the same time, it was determined that a three year restricted period was as long as the regulatory body could demand a holding of such property and still comply with the other objectives

and guides of the subject Surplus Property Act of 1944. Since a full discussion of the objectives and guides of the Surplus property Act of 1944 is appropriate, both to the validity of the restrictions in regulations themselves and the argument presented in this paragraph, *i.e.*, the necessity of the subject three year period, the next paragraph will treat both topics at the same time.

B. The restrictions on flight use and resale by public agencies as contained in the subject Regulation 4 (32 C. F. R., 1946 Supp., Sec. 8304.11(b)), and consequently the executed Form 65 Agreement were invalid as not being in accordance with the Surplus Property Act of 1944 (58 Stat. 358). Said Agreement must be read as though the invalid provisions were not contained therein. (*United States ex rel. Accardi v. Shaughnessy, supra.*)

1. The Court, as indicated hereinabove, implies in its decision that with the appropriate Regulation read into the executed WAA Form 65 after three years the District could resell the aircraft in suit for flight purposes [R. 134-138], without the consent of the Government, since the District held the aircraft over three years (4 years here). However, the Court assumes, for the purpose of the next part of its decision, the flight restriction was one which remained effective beyond the three year period, *i.e.*, a covenant running with the aircraft. The Court then shows in its decision by comparing the subject restrictions with the "objectives" of Congress in the Surplus Property Act of 1944 [R. 135-136] that such restrictions are invalid. The decision of the District Court in this connection is a study in itself of a com-

plete, clear and succinct statement showing the obvious conflict between these objectives and the subject restrictions. These objectives are going to be considered in detail in this brief, to not only to support the District Court's decision in this regard, but also to show that even assuming this Court should disagree with the District Court as to the *validity* of *any* such restrictions in the regulations, it would be necessary, in conforming the conflicts in the objectives themselves and the necessity that the Government receive "fair value," to find that the restrictions on public agencies concerning *both* resale and flight use for any purpose were *intended* and only could be intended by the regulatory body to remain in effect for a reasonable period of time, said period of time has been indicated by the regulatory body to be a period of three years.

a. The executed Form 65 Agreement provides in part as follows:

"Vineland Elementary School District . . . hereby certifies and agrees as follows . . . (6) that the acquired property will not be used for any actual flight purposes. (7) That all acquired property, when unfit for the above purpose, will be sold only as scrap and then only after it shall have been rendered completely unfit and useless except for its basic material content. Sales consummated within three years of the date of acquisition must have the prior approval of the Disposal Agency."

The applicable Regulation 4 provided in part as follows:

"The disposal agency shall establish procedures pursuant to which education . . . institutions or

instrumentalities may make written application for surplus aeronautical property available for disposal . . . Such procedures shall include . . . (2) a certification of the purposes for which the property is to be acquired, and in the case of aircraft and agreement that it will not be flown except for purposes of research and experiment in connection with the science of aeronautics, and (3) an agreement that the property will not be resold to others within three (3) years of the date of purchase without the consent in writing of the disposal agency unless it is mutilated or otherwise rendered unfit for use except as scrap.”

Thus, the executed WAA Form 65 Agreement prohibits entirely all flight use, whereas subsection (2) of the applicable Regulation 4 permits flight for both research and experimental purposes. Moreover, the restrictions as to disposal contained in the Form 65, in paragraph (7) thereof, are without limit in point of time, whereas subsection (3) of the amended Regulation limits restrictions upon disposal only to a period of three years next following purchase.

b. The objectives of the Surplus Property Act of 1944 are set forth in Section 2 of said Act. Each provision is herein set forth with our notation thereafter as follows:

“Sec. 2. The Congress hereby declares that the objectives of this Act are to facilitate and regulate the orderly disposal of surplus property so as—

“(a) to assure the most effective use of such property for war purposes and the common defenses”;

Any restrictions on flight use, even for research and experimentation, and resale by a public agency

could never allow an effective use or any use for war purposes and the common defenses.

“(b) to give maximum aid to the reestablishment of a peacetime economy of free independent private enterprise, the development of the maximum of independent operators in trade, industry, and agriculture, and to stimulate full employment”;

Clearly, only a right to unrestricted resale and flight uses would give any aid to the re-establishment of free independent private enterprise and the development of independent operators and stimulate full employment. Certainly, a restriction on flight use and resale, unless the aircraft was mutilated to basic material content, would be contrary to this objective.

A 3 year maximum waiting period could be construed as appropriate under this provision.

“(c) to facilitate the transition of enterprises from wartime to peacetime production and of individuals from wartime to peacetime employment;”

Only a right to unrestricted resale and flight use would be applicable since such would be the only feasible peacetime use of the facility. A three year maximum waiting period, however, could be construed as appropriate.

“(d) to discourage monopolistic practices and to strengthen and preserve the competitive position of small business concerns in any economy of free enterprise;”

Clearly, again the unrestricted right of resale and flight uses would strengthen and preserve the competitive position of *small* businesses and discourage monopolistic practices.

“(e) to foster and render more secure family-type farming as the traditional and desirable pattern of American agriculture;”

This section would not appear to be applicable to the subject case and is one which could be and was ignored by the regulatory body in adopting the subject Regulations. The government would have us believe in their brief (p. 26), however, that a disposal agency and the regulatory body could ignore many of the objectives of the subject Act and only adopt a few of its regulations merely because of provisions such as this one which, in the particular instant, would not apply. Merely because a provision as clear as this one does not apply does not mean that the regulatory body and the disposal agency can thereby ignore many of the other objectives of the Act without making any attempt to adopt a regulation and agreement which accords with as many of the subject objectives as are applicable and possible.

“(f) to afford returning veterans an opportunity to establish themselves as proprietors of agricultural, business, and professional enterprises;”

How could a returning veteran be given opportunity to establish himself as a proprietor in the aeronautical business or enterprise unless he was given an opportunity to purchase the subject aircraft through a resale from the public agencies? The instant case is directly in point since the Finns are veterans and apparently intended to establish an independent small business. [R. 151.]

“(g) to encourage and foster post-war employment opportunities;”

It is clear no post-war employment opportunities are afforded by school districts hoarding aircraft forever or reducing them to their basic material content.

“(h) to assure the sale of surplus property in such quantities and on such terms as will discourage disposal to speculators or for speculative purposes;”

It must be kept in mind that before a disposal agency could transfer surplus aircraft to a school district, that it was required and did find that such aeronautical property was “commercially unsalable.” [R. 509.] A clear interpretation of this provision and a finding by the applicable disposal agency in connection with the subject aircraft that the subject aircraft was “commercially unsalable” can be found in the front page, under paragraph II, of a document entitled “War Assets Administration,” Vine-land’s Exhibit “E,” wherein it is stated as follows:

“Distribution under this plan will be confined to aeronautical property which has been determined by the disposal agency to be commercially unsalable by reason of its condition resulting from damage, wear obsolescence, or otherwise, *has no reasonable prospect of sale except as scrap*, or with respect to which *by reason of its large supply or prior use the estimated cost of care, handling and disposal will exceed the estimated proceeds unless it is promptly sold as scrap*, or with respect to which *the estimated cost of care, handling and disposal will exceed the estimated proceeds as scrap, or otherwise.*”

Thus, it would appear that the regulatory body and the disposal agency at the time of offering the

subject aircraft for sale to the Vineland School District did so with the assurance, and only after an investigation and administrative determination, that such a sale would not be one from which speculators could obtain large or any profits. That this finding was appropriate and accurate is further evidenced by the fact that the subject District received no offers for the subject aircraft until the year 1950, after the Korean War had broken out. The plane had *no* value in 1946 and until the Korean War came along. [R. 895.] Particularly with reputed restrictions thereon. [Duly testimony, R. 299.] (See also testimony *re* Duly statement that Finns should throw gasoline on the airplane in suit and burn it up.) [R. 418-419, 413-414.]

A three year maximum restriction on resale could be construed as appropriate here in the regulation and agreement to prevent school districts from being a channel whereby speculators would be able to obtain surplus aircraft for resale at a profit. In the year 1946 such surplus aircraft were a "drug on the market" [R. 533-535], and after a three year holding period by school districts and use by said districts for educational institutions, and its consequent deterioration, obsolescence, wear and tear to said surplus aircraft, it seems only reasonable that the regulatory body determined and intended that unrestricted resale by a school district would not violate the subject objective of the Act. Said aircraft would be even more a "white elephant," [R. 420] and after such use be of no value, and certainly less valuable, for the purposes of speculation. The Korean conflict certainly was not contemplated in 1946.

“(i) to establish and develop foreign markets and promote mutually advantageous economic relations between the United States and other countries by the orderly disposition of surplus property in other countries;”

Certainly, this objective could not be complied with by a restriction on all flight uses and right of resale. To the contrary, the subject sale would have allowed the exact objective set forth herein. Finns indicated they had a desire to fly freight between Mexico and the United States.

“(j) to avoid dislocation of the domestic economy and of international economic relations;”

As pointed out in our discussion of objective (h) hereinabove in 1946, the subject aircraft was apparently not considered “commercially salable,” and therefore even if schools sold said aircraft, there would be no large price therefor, nor would such a “white elephant” cause any dislocations.

It would seem reasonable that the regulatory body placed the three year restriction in the subject regulation for the purpose of satisfying this objective, since as pointed out in our comment to (h) hereinabove, the regulatory body apparently intended that there be some restrictions for an adjustment period of approximately three years, but after such period (1946 to 1949) any possibility of “dislocation” would be over.

“(k) to foster the wide distribution of surplus commodities to consumers at fair prices;”

There clearly would be no wide distribution, nor in fact none at all, to consumers at fair prices or

any price if there were no provisions for resale by a public agency and if it was necessary for such an agency to reduce the property to basic material content.

“(1) to effect broad and equitable distribution of surplus property;”

Again, there could be no broad and equitable distribution of surplus property if such property were to remain in the control of a public agency forever or reduced to basic material content.

“(m) to achieve the prompt and full utilization of surplus property at fair prices to the consumer through disposal at home and abroad with due regard for the protection of free markets and competitive prices from dislocation resulting from uncontrolled dumping;”

As previously indicated, in discussing objectives (h) and (j), the disposal agency apparently did not believe the subject aircraft was commercially salable so as to cause any dislocation at the time the subject aircraft was sold. It appears that this very difficult objective demanding both prompt and full utilization of surplus property and yet a regard for protection of free markets and competitive prices from this dislocation by uncontrolled dumping could be construed as ingenuously covered by the regulatory body in indicating *prompt disposal* to education institutions yet with the demand that such educational institutions hold said property from the market for a period of three years, after said period the property could be sold without restriction, thus giving full utilization to the consumers. Certainly, once again there

could not be prompt and full utilization of the subject property if it were determined that school districts could never resell the subject property for flight purposes or without reducing it to basic material content.

“(n) to utilize normal channels of trade and commerce to the extent consistent with efficient and economic distribution and the promotion of the general objectives of this Act (without discriminating against the establishment of new enterprises);”

What better way to utilize normal channels of trade consistent with *efficient and economic* distribution *without discriminating* against the establishment of new enterprises than allowing resale by other public agencies who are almost uniformly demanded by law to sell personal property of said agency by means of competitive bidding to the highest responsible bidder. To restrict resale to non-flight use or reduction to basic material content would certainly discriminate against establishment of new enterprises.

“(o) to promote production, employment of labor, and utilization of the productive capacity and the natural and agricultural resources of the country;”

Certainly, there could be no such promotion and utilization by a restriction as to resale and a necessity to reduce the property to basic material content.

“(p) to foster the development of new independent enterprise;”

There is *none* without resale and future flight uses.

“(q) to prevent insofar as possible unusual and excessive profits being made out of surplus property;”

As pointed out in our discussions of (h) and (j) hereinabove, in 1946 the regulatory body and the disposal agency determined the subject plane was “commercially unsalable,” and therefore would have been reasonable in determining that “insofar as possible” there could not be unusual and excessive profit made out of the resale by public agencies of surplus property. Such was clearly the case until the Korean conflict. Once again the three year *maximum* limitation could be found as intended to resolve this objective. Surely after a holding thereof by public agencies for a period of three years, and an educational use by such public agencies with its consequent deterioration, obsolescence, wear and tear on the subject property, would leave little doubt in 1946 that no profits could be made out of such property. Again, it was only the Korean conflict, unforeseeable to the regulatory body or school district, which caused any price increase making possible a profit in the subject surplus property.

“(r) to dispose of surplus property as promptly as feasible without fostering monopoly or restraint of trade, or unduly disturbing the economy, or encouraging hoarding of such property, and to facilitate prompt redistribution of such property to consumers;”

This most difficult objective which appears contradictory in itself demanding a prompt disposal without fostering monopoly, disturbing or encouraging hoarding and yet facilitating a prompt redistribution

to consumers would *only* be complied with under unrestricted rights of resale and flight use in the public agency or at most a three year restriction to pay “benefits” to the Government. Certainly, there would be a *hoarding* and *no redistribution* to consumers and there would be a fostering of *monopoly* and *restraint of trade* if it were intended that school districts must hold the aircraft forever or reduce it to basic material content.

“(s) to dispose of surplus Government-owned transportation facilities and equipment in such manner as to promote an adequate and economical national transportation system; and”

There certainly could be no developing of an adequate and economical national transportation system if public agencies were not allowed to resell without having to reduce to basic material content or were not even allowed to use such aircraft for any flight purposes, including research and experimentation. The instant case is a perfect case of a sale made tending to promote development and competition in the national transportation system.

“(t) except as otherwise provided, to obtain for the Government, as nearly as possible, the fair value of surplus property upon its disposition.”

A disposal of the subject school district of a “commercially unsalable” aircraft for Two Hundred Dollars (\$200) was, in all probability, not only “fair value” in 1946, but a “God send” to the Government, another “white elephant” being taken off its hands, [R. 533-535, 420], without the necessity of advertising for bids, etc. The administrative agency had determined the aircraft “had no reasonable prospect of

sale except as scrap,” or “by reason of its large supply or prior use the estimated cost of care, handling and disposal will exceed estimated proceeds . . .”, “or with respect to which the estimated cost of care, handling and disposal will exceed the estimated proceeds as scrap, or otherwise.” See also “Sales Receipt” [International’s Ex. A-1] that \$200 was “payment in full” for the subject aircraft.

It would seem reasonable to find that the regulatory body intended, in adopting the three year provision demanding a holding of the subject surplus property by public agencies, did so “as nearly as possible” to obtain sufficient educational use by such a public agency. The federal government would thus obtain its “fair value” by such an educational use by public agencies, in addition to the Two Hundred Dollars (\$200) cash value paid for the subject aircraft. See “Sales Receipt” [International’s Ex. A-1], however, that \$200 was “payment in full” for the subject aircraft. It seems only reasonable that in 1946, when the subject aircraft had little market value and were a “drug on the market,” that in three years, said aircraft, with their subsequent deterioration and obsolescence would be of no value or practically valueless, and during said three years, the Government would obtain any and all reasonable anticipated benefits to be derived by the Government through educational use. The advisory jury adopted a value of Five Thousand Dollars (\$5,000) on the aircraft in suit when it was transferred to the school district. (But Government’s witness Duly indicated that was the value in 1947 or 1948. [R. 281, 300.]) No value in 1946. [R. 895.] Burn it up. [R. 418-419,

413-414.] Only metal with restrictions Duly. [R. 299.] However adopting the value of Five Thousand Dollars (\$5,000) for the subject aircraft at the time it was transferred to the Vineland School District; the School District paid a sum of Two Hundred Dollars (\$200) for the subject aircraft, it would seem reasonable that the regulatory body intended and determined the sum of One Thousand Six Hundred Dollars (\$1,600) per year (\$4,800 for three years) would be an adequate return to the Government through a school district's use of the subject aircraft for education purposes for a period of three years. This is particularly true in the instance of the Vineland School District, which used the subject aircraft for a classroom, in addition to other instructional and educational purposes, thus saving the public, for a period of four years, the expense of constructing a temporary classroom or leasing such a classroom, in order to take care of a great need for such a facility by the District. [See film, Deft. Vineland's Ex. "F," R. 510-512.]

c. The restriction against flight use and resale as they appear in the appropriate regulation and WAA 65 agreement was thus invalid. Said agreement must thus be read as though such restrictions are not contained therein. However, giving the regulatory body the benefit of a presumption of validity the only way such restrictions can be found to be valid is to interpret them as being limited to a reasonable time, in this instance three (3) years.

C. The Government indicates in its brief that “the legislative history demonstrates that Congress intended such restrictions.” To the contrary, such legislative history clearly demonstrates that Congress never intended such restrictions and demanded the *removal* of any such restrictions.

The Government in its brief sets forth various acts in detail which recite therein, in general, that terms, conditions, reservations and restrictions, etc., which have been imposed are not to be disturbed. Obviously Congress in any subsequent enactment of its own which refers to its previous acts will make a general statement concerning the conditions in previous act; however, this in no way makes legal or proper any terms, conditions, reservations or restrictions which may have previously been imposed by a regulatory body or administrative agency which were not authorized by law or appropriate regulation.

Congress clearly indicates in its most recent enactment (1955) its intent that the subject restrictions were never intended and any existing *legal* restrictions are no longer to be effective, Public Law 61, 84th Congress, First Session (H. R. 3322), Section 4a thereof, provides:

“ . . . In the case of personal property donated or sold at a discount for educational, public health or memorial purposes, including research, under any provision of law enacted prior to the enactment of the Federal Property and Administrative Services Act of 1949, no term, condition, reservation, or restriction imposed on the use of such property shall remain in effect after the date of the enactment of this Act.”

Congress then continued to protect the United States on any *proper* litigation then pending by providing:

“This subsection shall not be deemed to terminate any civil or criminal liability arising out of a violation of such a term, condition, reservation, or restriction which occurred prior to the enactment of this Act, if a judicial proceeding to enforce such liability is pending at the time of, or commenced within one year after the enactment of this Act.”

This enactment clearly indicates that instead of showing an intent that terms, conditions, reservations or restrictions on the *use* of such property are to be recognized, that any and all of such restrictions instead are to be removed completely and immediately. Upon having the surplus property program completely aired before the House Committees, and a detailed investigation having been made in connection with the Act of 1955, set forth hereinabove, it goes without saying that if Congress intended that the restrictions that the Government would have us now enforce, were to have been imposed in the first place under the Congressional Act, particularly now that confusion has arisen in connection therewith, the Congress would have enacted a public law, fully setting forth such restrictions and giving the administrative agency clear power of enforcement thereof; but to the contrary, Congress chose to do away with any such terms, conditions, reservations or restrictions whatever, imposed upon the use of any such property, thus clearly, indicating their intent in this regard.

D. In summary the following propositions thus appear :

1. The provisions of the executed Form 65 agreement concerning restrictions on flight uses and resale of the subject aircraft were clearly inconsistent and erroneous and thus invalid when compared to the appropriate Regulation 4.

2. The appropriate Regulation 4 (assuming it valid), contains a limitation on restrictions to three years, which must be read into the executed agreement, the agreement would thus contain *no restrictions* for resale by school district for *any purposes* including a contemplated flight use. Therefore the subject transfer by Vineland School District was not contrary to said agreement nor any regulations of the Government.

3. Assuming that the flight restriction is determined as a covenant running with the aircraft and does not expire at the termination of the three-year period indicated in the appropriate Regulation 4, such a restriction appearing in the regulation and, consequently, in any agreement is invalid as not complying with the general objectives as set forth by Congress in the Surplus Property Act of 1944. Therefore the executed WAA Form 65 Agreement must be read without any restriction on flight use as such restriction may appear in said agreement or in the appropriate Regulation 4.

4. Assuming that this Court does not agree with the District Court that the restriction on flight use is invalid and should not appear in the appropriate Regulation 4 at all. It must nonetheless be deter-

mined in order for the appropriate Regulation 4 to comply with the objectives of the statute that the regulatory body intended and made a part of said Regulation 4 a requirement that such a restriction on flight use and necessarily any restrictions on resale of aircraft held by public agencies *would expire* in a reasonable time after acquisition of such aircraft; and that such a reasonable time was determined and intended by the regulatory body in adopting the subject Regulation 4 to be a period of *three years*. Therefore, inasmuch as the school district held the subject aircraft for a period of four years from the date of purchase, the subject transfer did not violate the executed War Assets Administration Form 65 as read with the appropriate regulation, nor with any other rules or regulations of the Government.

5. Contrary to the Government's allegation, Congress has indicated its intent by recent legislation that "no . . . restriction on use shall remain in effect." If its intention were to the contrary, Congress could have resolved any ambiguities in this field by clarification legislation and a ratifying of such restrictions, and provide enforcement thereof.

II.

Assuming This Court Finds the Restrictions Against Resale and Flight Uses by the School District Were Not Invalid, and Further Assuming the Three Year Provision Did Not Release the District of Said Restrictions, the District Did Not Violate Such Restrictions Inasmuch as There Was No Transfer of Right, Title or Interest in the Aircraft in Suit to the Finns.

A. It is conceded by the Government (see "Brief for the United States," II-B, pp. 66-70) and it is clear that there was no transfer of right, title or interest, nor a general right of possession, to the Finns by School District for the following reasons:

1. In accordance with the agreement [Vineland's Ex. "B," R. 59] and documents related thereto between the School District and the Finns, right, title and interest to the aircraft in suit did not pass to Finns until all *conditions precedent* of said agreement and said documents should be performed by Finns; and since said conditions precedent had not been performed, School District was and is entitled to immediate possession of the aircraft in suit, and was and is the owner of all right, title and interest thereto. (See Appellant Vineland's Op. Br., Argument I, pp. 8-13. See also "Brief for the United States," II-B, pp. 66-70.)

2. The agreement [Vineland's Ex. "B," R. 59] and documents related thereto between School District and Finns was a *conditional sales contract*, a condition or conditions of which had not been performed by Finns, and therefore the School District was and is entitled to immediate possession of the

aircraft in suit, and was and is the owner of all right, title and interest thereto. (See Appellant Vineland's Op. Br., Argument II, pp. 14-16. See also "Brief for the United States," II-B, pp. 66-70.)

3. The sale of the aircraft in suit by School District to Finns was illegal and void, the agreement between School District and Finns [Vineland's Ex. "B," R. 59], a bill of sale executed by defendant Bancraft in favor of Finns [Finns Ex. "K-4"], and any other agreements and instruments concerning the sale of the aircraft in suit by District to Finns were illegal and void for the same reasons that the subject sale was illegal and void. (See "Brief for the United States," II-B-1, pp. 69-70.)

B. The Government indicates in its Brief (pp. 51-55) that, if this Court should determine that Vineland did not manifest an intention to transfer title to Finns, at least until the necessary Governmental releases had been obtained, or for other reasons indicated in Appellant Vineland's Opening Brief, neither title nor possession to the subject aircraft was ever transferred to Finns from Vineland (the Government concedes Vineland's position has substantial merit in this regard in its Brief, pp. 51, 67-70), and assuming this Court determines that the restrictions against resale and flight use were valid, the Government is nonetheless entitled to damages against Vineland for breach thereof. The Government's contention, in general, is based upon these three propositions: (1) The District's action might have permitted conveyance of good title to a bona fide purchaser; (2) Vineland's permitting Finns to fly subject aircraft from the school to Los Angeles violated the restriction on "any

flight purposes”; (3) Assuming neither of the last two arguments are accepted by the Court, that Vineland violated the clause requiring the subject plane be reduced to its material content if sold as scrap.

1. The Government’s first contention that Vineland’s action might have permitted conveyance of good title to a bona fide purchaser is purely speculative and contrary to law.

a. A speculative conclusion that a bona fide purchaser *might have* obtained title has no place in the consideration of a Court of law, particularly as part of complaint for *actual* damages to a plaintiff. No such conveyance occurred here.

b. The *law* is clear that even a bona fide purchaser does not have any rights as against the owner of legal title on a conditional sale. (See Appellant Vineland’s Op. Br., Argument I-F-1, p. 13; *Oakland Bank and Savings v. California Pressed Brick Co.*, 183 Cal. App. 295, 297; *Phelps v. Loupias*, 97 Cal. App. 2d 350.) The Government in presenting this argument has conceded that the subject sale was a conditional one. (“Brief for United States,” p. 52.)

c. Even assuming the Government’s position to be accurate the Government’s remedy is injunction or at most nominal damages. (*Infra*, VI, pp. 56-61.)

2. The Government’s second contention is set forth on page 53 of the “Brief for the United States” wherein it is indicated “. . . Vineland . . . breached the conditions restricting the use to which the plane *might* be put; *i.e.*, that the plane was to be used for non-flight instructional purposes

[Paragraph 2, R. 15] and that it ‘will not be used for any actual flight purposes’ [Paragraph 6, R. 15].”

a. Again the Government is dealing in mere speculation in indicating a breach of a use which “*might be put.*” What the School District knew as to what the aircraft in suit “would be” used for is pure speculation. The Agreement provided also for scrapping of the plane in suit or release of the entire Agreement as to defendants Finn. Even assuming the District knew and intended an eventual flight purpose, it cannot be said that a void or illegal act and/or that an unexecuted *attempt* to allow the subject aircraft to be used for flight purposes is a breach of the subject paragraph of the WAA Form 65 Agreement.

It is to be noted in studying both Paragraph 2 and Paragraph 6 of the executed WAA Form 65 Agreement [R. 15] that the flight restriction contemplates a *use and purpose* which is non-flight in nature. Certainly, such a *use and purpose* contemplated more than one or an occasional such use. Such a singular or occasional flight use may well have been within a non-flight use recognized for educational purposes. Since the word “use” ordinarily contemplates a *continuing* activity and not just occasionally or one instance, clearly one flight could not be construed as a violation contemplated within the restriction of the subject Form 65 Agreement. This is particularly true in the instant case when we consider that the subject flight was consented to by the district for the “*sole purpose*” of enabling work to be done upon said aircraft which could not be completed on

the school district grounds. [Special Verdict, Interrogatory 7, R. 113.] Said flight in itself for such purposes could still be construed as a valid *educational use* and *purpose* and would not be a *use* of the subject aircraft for a flight *purpose*.

(1) The subject flight by defendants Finn was in keeping with the education use of the subject aircraft, inasmuch as whatever work was to be done upon the subject plane, and whatever materials were to be added thereto would inure to the benefit of the district and would, in the event defendants Finn did not obtain the proper consents and releases of the Federal Government or perform all of the conditions of their contract with the district, make said aircraft an even better and more complete plane for educational uses to the Vineland School District. Uncontradicted testimony at the trial showed that the Defendants Finn returned the subject aircraft to Bakersfield after the subject work was done on said plane, and that the return of said plane was accomplished by Defendants Finn in keeping with the above indicated intent that the school district use should continue. [R. 474-475.] Only actions of the Defendants Finn in connection with their difficulties with International Airports, Inc., and the plaintiff United States of America then prevented further educational use.

b. Even assuming the District knew and intended eventual flight purposes, the evidence is clear that the real *use* and *purpose* of said aircraft remained *educational until all consents* had been obtained and all conditions of the contract [Vineland's Ex. "B," R. 59], had been performed. This is clear

in the evidence presented in the subject action by the Agreement [Vineland's Ex. "B"], by the special verdict of the jury [R. 112-113], and Finn return of the aircraft to Bakersfield. [R. 474-475.]

(1) The Agreement [Vineland's Ex. "B," R. 59], provides that the *use* of the subject aircraft shall remain in the school district. [R. 60.] This use is to remain in the District even assuming for the purposes of this argument that the title and possession passed to defendants Finn by said Agreement or by bill of sale issued thereafter, or by release of the physical possession of the plane in suit.

(2) The jury, in its special verdict, indicates this finding in answer to Interrogatory No. 7 [R. 113], wherein it determined, in general, that defendants Vineland Elementary School District and Peter A. Bancroft intended that the physical possession of the airplane in suit was given to defendants Finn for the *sole* purpose of enabling work to be done on the aircraft which could not be done on the school grounds, and in answer to Interrogatory No. 2 [R. 112], wherein it determined, in general, that the defendant District did not intend to transfer title to the airplane in suit to defendants Finn at any time before all necessary consents and releases and waivers of the Government had been procured.

c. In connection with the Government's argument that Vineland has breached the non-flight restriction, the Government also alleges on page 54 of its Brief that Vineland, in releasing the subject aircraft to defendants Finn for a flight to Los Angeles to have work done thereon, was "conduct, which viewed even

in its best light, constituted negligent disinterest. . . .” It would appear to be unreasonable to hold a school district superintendent to a requirement that he know whether or not waivers or releases have been obtained through all administrative agencies of the United States Government in Washington after he has been shown a proper Civil Aeronautics Administration certificate of flight clearance, and assured by the persons with whom he is dealing and has confidence that such flight certificate cannot be issued without proper clearance of other federal agencies concerned. It also seems clear that said superintendent took the only reasonable action, in connection with checking said documents, available to him at the time and under the circumstances by attempting to contact his legal counsel, who, unfortunately, was not in town at the time. [R. 539-540.] Even then it is clear that the School District *only* released physical possession of the aircraft to allow the work to be done upon the aircraft [Interrogatory No. 7, R. 113] and by agreement, the educational *use* of the subject aircraft continued in the district [R. 60], and it was the intention of the District that title should not pass on the subject aircraft until all releases were obtained. [Vineland’s Ex. “B,” R. 59; Interrogatory No. 2, R. 112.] Is this to be construed as negligence on the part of the district? Compare the district’s extreme care and spirit of cooperation in indicating to bidders and in its agreement with the Finns that Government consent be obtained. This in face of the fact that the law provides, as pointed out herein and by the district court that no such releases were

necessary. If anything, the district's actions have indicated an "abundance of caution."

3. As to the last contention of the Government, clearly Vineland never delivered the subject aircraft nor legally released possession or custody of the plane and therefore could not have violated the scrap clause of the executed Form 65 whether or not a technical distinction is made between the words "scrap" and "salvage". In fact, the Government, in taking up the technical argument of the distinction between salvage and scrap (Govt. Br. pp. 54-55), prefaces its remarks by indicating ". . . even if . . . Vineland had not released custody of the plane prematurely . . .," how can the District be held to have violated the scrap warranty clause if Vineland has not released custody of the airplane and it is thus technically in the control of Vineland. [If all other determinations are in favor of the Government, there may be a right to injunction (for continued educational use) or nominal damages due the Government (see *infra*, VI, pp. 56-61) but certainly nothing else.]

The Agreement between Vineland and Finns [Vineland's Ex. "B," R. 59] clearly indicated that it was subject to releases and consents of the Federal Government. Thus even if it be determined that there was a technical violation of the scrap clause in that the word "salvage" was used instead of the word "scrap," no such sale occurred until releases of the Government had been obtained therefor.

Although there appear to be technical provisions in the law distinguishing scrap and salvage, it does not appear that the District in advertising the subject aircraft for sale, in executing an agreement in connection therewith, or in any of its actions in connection with such a sale or release of physical possession thereof intended to do anything except comply with the law as it then existed as between the Government and the School District. It appears reasonable that the District in inserting the salvage clause in the subject agreement did so in order to comply with the "scrap" clause of the War Assets Administration Form 65 Agreement. There would be no other reason for the clause being inserted. A public agency is presumed to act in accordance with the law. To hold a Board of Trustees of a School District made up of a group of farmers in a very poor area [R. 510] to a technical distinction between scrap and salvage would be clearly unreasonable and unjustified.

III.

Appellee School District Is Not Estopped to Deny That the Terms of WAA Form 65 Are Valid or to Deny That a Breach of the Terms Entitles the Government to Retake the Plane.

A. Regardless of the belief of either or both the Government and Vineland as to what was the legal effect of the restrictive terms of WAA Form 65, Vineland is not now estopped to show that the effect was different than believed by said parties at the time of execution of the agreement. If the Government seeks to raise an estoppel by deed to establish a proprietary interest of its own in the plane, the effort must necessarily fail in view of the holding of the court below that the restrictions contained in WAA Form 65 were unauthorized and improper under the governing statute. Neither waiver nor estoppel will lie to give validity to the conduct of the disposal agency in placing unauthorized restrictions in the agreement transferring the plane which was contrary to public policy or statutory law designed for the public benefit. (*Almassy v. Los Angeles Civil Service Commission*, 200 P. 2d 846, subseq. op. 34 Cal. 2d 387, 210 P. 2d 503; *Roberts v. Roberts*, 81 Cal. App. 2d 871, 185 P. 2d 381; *Dickey v. Raisin Proration Zone No. 1*, 140 P. 2d 53, subseq. op. 151 P. 2d 505, 24 Cal. 2d 796, 157 A. L. R. 324, cert. den. 65 S. Ct. 1013, 324 U. S. 869, 89 L. Ed. 1424, reh. den. 65 S. Ct. 1183, 325 U. S. 893, 89 L. Ed. 2004.)

B. The doctrines of estoppel by conduct and ratification have no application to a contract which violates the express mandate of the law. (*Herkner v. Rubin*, 126 Cal. App. 677, 14 P. 2d 1043.) Furthermore, even if

it should be held that the restrictions contained in WAA Form 65 were not contrary to public policy or statutory law, still an estoppel should not be raised against Vineland in view of the fact that the restrictions contained in said WAA Form 65 were immaterial to the conveyance. At best the restrictions were merely contractual, and they were unnecessary to the conveyance.

1. A party to a conveyance is not estopped by recitals immaterial and unnecessary to said conveyance. (*Osborne v. Endicott*, 6 Cal. 149, 65 Am. Dec. 498; *Marlenee v. Brown*, 128 P. 2d 137, subseq. op. 134 P. 2d 770, 21 Cal. 2d 668; *Simson v. Eckstein*, 22 Cal. 580; *Redman v. Bellamy*, 4 Cal. 247.)

2. The restrictions were immaterial to the conveyance, since WAA Form 65 failed to go further and provide that there would be a reverter of title to the plane to the Government in the event of a breach of the restrictions. No reverter in the event of breach will be read into the conveyance of the plane, since forfeitures are disfavored in the law. [R. 130.] The law also looks with disfavor on restraints against alienation. [R. 130.]

C. An estoppel resting in deed means only that a litigant is forbidden to show the existence of a fact, where by such deed it would work injustice and injury to his adversary to permit him to do so. (*Allen v. Hance*, 161 Cal. 189, 118 Pac. 527.) Here there can in fact be no injustice worked on the Government by giving effect to the statutory rule governing disposal of surplus aircraft to educational institutions as pointed out by the Court below since the Government was in a far more favorable position than Vineland to know that the restrictions con-

tained in WAA Form 65 were invalid and of no effect under the governing statute.

D. Similarly, the instant case does not involve the proper type of fact situation for the application of the doctrine of equitable estoppel, or estoppel *in pais*.

1. To constitute an equitable estoppel five elements need be present: a false representation or concealment of material facts; knowledge, actual or constructive, of the true facts; ignorance of the party to whom representations were made of truth of the matter; intent, actual or constructive, that said party should act on it; and an act in reliance thereon. (*Faulkner v. Bank of Italy*, 69 Cal. App. 370, 231 Pac. 280.) The doctrine proceeds on the theory that the party has by his declarations or conduct misled another to his prejudice, so that it would be a fraud on the latter to allow the true state of facts to be proved. (*American National Bank of San Francisco v. A. G. Sommerville, Inc.*, 191 Cal. 364, 216 Pac. 376; *Parker v. Funk*, 185 Cal. 347, 197 Pac. 83; *Burritt v. Dickson*, 8 Cal. 113.)

2. In the instant case, there were no misrepresented or concealed facts nor misleading declarations or conduct by Vineland, but rather the controversy has arisen over what is the proper interpretation and effect to be given to the restrictions appearing in WAA Form 65. In other words, the action involves the question of what is the applicable law, and it is clear that a mistake of law is not ground for an estoppel, *Stewart v. United States*, 24 Fed. Supp. 145, reversed 106 F. 2d 405, cert. granted *United States v. Stewart*, 60 S. Ct. 711, 309 U. S.

647, 84 L. Ed. 999, reversed 61 S. Ct. 102, 311 U. S. 60, 85 L. Ed. 40, reh. den. 61 S. Ct. 390, 311 U. S. 729, 85 L. Ed. 477, affirmed 117 F. 2d 743; *Van Antwerp v. United States*, 17 Fed. Supp. 229, reversed 92 F. 2d 871.

3. Furthermore, the Government must be charged with having had knowledge of the governing law and the true meaning and effect to be given the restrictions, since it was the Government itself which formulated and adopted the statutes under which those restrictions were purportedly framed. Accordingly, it cannot be said that the Government was misled in any manner by Vineland. (*California Pear Growers Assn. v. Hersprings*, 60 Cal. App. 503, 213 Pac. 518.)

E. Appellant Government cites Vineland's acquiescence in the Government's administrative interpretation of the effect to be given to the restrictions contained in the WAA Form 65 as constituting a ground for estoppel (Govt. Br. p. 48). That position is erroneous, since Vineland's action constituted neither a ratification of the administrative interpretation nor a waiver of the benefits to be derived from the correct interpretation to be given said restrictions.

1. There could be no ratification since a ratification must be in the same form as the original authority, and there can be no ratification where the restrictions were immaterial and unnecessary to the conveyance. (Cf. *American National Bank of San Francisco v. A. G. Sommerville, Inc.*, 191 Cal. 364, 216 Pac. 376.)

2. Nor did Vineland's acquiescence in the Government's interpretation of the restrictions constitute a waiver of the correct interpretation to be given those restrictions, since a waiver occurs only where there is an intentional relinquishment of a *known* right (*Pacific States Corp. v. Hall*, 166 F. 2d 668; *Michener v. Johnston*, 141 F. 2d 171; *Robinson v. Johnston*, 50 Fed. Supp. 774; *Wienke v. Smith*, 179 Cal. 220, 176 Pac. 42), and here Vineland did not know that the restrictions contained in WAA Form 65 were in law and in fact invalid.

F. As an additional argument against the raising of an estoppel against Vineland in the instant case, it must be remembered that estoppels are not favored in law and may only be raised where the facts clearly warrant. (*Beard v. Melvin*, 60 Cal. App. 2d 421; *Selinger v. Milly*, 51 Cal. App. 2d 286; *Murphy v. Clayton*, 113 Cal. 153, 45 Pac. 267.)

G. This Appellee has been unable to find where the Government raised the subject issue of estoppel in the court below. Certainly there are no such pleadings or prayer, nor is it mentioned in the decision, therefore such an argument has no place in a brief before this court.

IV.

In Transferring the Subject Aircraft to Vineland School District, the Government Retained No Interest in Said Aircraft Entitling It to Possession Thereof.

As pointed out previously in this brief and by the District Court in its decision, Vineland has not breached any conditions of the WAA Form 65 Agreement. However, assuming for the purposes of this argument that such a breach is found by this Court, it is clear in the decision of the District Court, and as shall be pointed out in the following material, that the Government retained no right of reentry, forfeiture or other interest entitling it to possession of the subject aircraft.

The Government, in its Brief, to substantiate its argument that it retained a proprietary interest in the aircraft in suit and a right of re-entry therefor, sets forth a detailed analysis of *possible* characterizations of the Government's rights in the subject aircraft; *i.e.*, bailment, trust, determinable fee. Although the Government's discussion in connection with these possible characterizations is a detailed dissertation, it appears clear from the plain language of the documents, regulations and statutes being considered that the only characterization which can properly be placed upon the transaction between the Government and the School District is that it was a "sale" (Surplus Property Act of 1944 demands a "sale" or "lease" [R. 129]), and at the time of the transfer of subject aircraft, the regulation authorized only a "sale." [R. 129.] No language of bailment or trust anywhere appears. A determinable fee is properly a real property matter.

Therefore, the only appropriate discussions in connection with said sale would appear to be whether or not the sale was conditional, with a right of re-entry, or forfeiture reserved in the Government. In face of the clear language of the WAA 65 Agreement, "Sales Receipt," other documents relevant to the subject transfer, applicable regulations and statutes, to hold that the Government has reserved a right of re-entry or forfeiture or that the subject transaction is a bailment, trust or determinable fee would be for the court to *rewrite* the agreement between the parties.

The Government has pointed out in its Brief (p. 40) that any ambiguity in a grant is to be resolved favorably to a sovereign grantor—"Nothing passes but what is conveyed in clear and explicit language." The Court's decision in connection with this matter is a study in itself of a concise statement excellently and fully presented, indicating that there is not only no "ambiguity" in the subject grant, but that what is conveyed in the way of title appears in most clear and explicit language." (See Decision of the District Court, pp. 128-130.) Contrary to the Government's argument, the applicable maxims which should be applied in the instant situation to determine whether or not the Government retained any interest granting a right of re-entry is the general maxim that restrictions upon title which restrain alienation and use are not favored by the law, and also the maxim that the law abhors forfeiture. As pointed out by the District Court [R. 130], "So where, as here, there are 'no express terms creating a condition, no clause of re-entry nor words of any sort indicating such purpose, the conclusion is unavoidable that the obligation in question is a covenant . . .' (Columbia Railway, etc., Co. v.

South Carolina, 261 U. S. 236, 248, 250 (1923)) for the breach of which damages would be the only remedy. (See: United States v. Michigan, 190 U. S. 379 (1903); Northern Pacific Railway v. Townsend, 190 U. S. 267 (1903); Emigrant Co. v. County of Adams, 100 U. S. 61, 71 (1870).)”

A. The Court’s decision that the Government retains no interest in the subject aircraft entitling it to possession upon Vineland’s breach is a succinct statement indicating no ambiguity in the grant and that what is conveyed is in clear and explicit language. The decision is condensed as follows:

1. The authority of the disposal agency to pass title is clear in the provisions of the statute that: “Surplus property . . . appropriate for school classroom or other educational use may be sold or leased . . .” (58 Stat. 770; 50 U. S. C. A. App., Sec. 1622(a)(1)(A) 1944.) It is clear in the instant case that the aircraft was not leased by the Government to Vineland. The only conclusion which must then be drawn is that it was *sold*.

2. The Court then points out that even more important, at the time the subject aircraft was delivered to the defendant School District, approximately July 25, 1946 [Pltf. Ex. 4], a *sale* was the “only permissible method of disposal,” for the regulation then provided: “After June 30, 1946, transport aircraft shall be disposed of only by sale.” (32 C. F. R. 1946, Supp. Sec. 8305.7.)

3. The applicable regulation indicates an intent of final sale in that it provided in part: The disposal agency shall compile a list of such items and

shall ascertain fixed *prices* . . . The disposal agency is authorized to dispose of such property to educational or public-health institutions or instrumentalities at the prices so approved . . . The property will not be *resold* to others within three years . . .” (32 C. F. R. 1946 Supp. Sec. 8304.11.) (Emphasis ours.)

4. The Court also points to the documentary evidence indicating the intention of the parties as to the nature of the interest transferred to Vineland as follows:

a. Disposal Agency’s Instruction Form Sheet [Vineland’s Ex. “E”] outlines in Instruction 3, “How to Purchase”; in Instruction 4, refers to the “prices.”

b. As indicated above, the regulation itself refers to “prices” and “resold.”

c. School Superintendent Bancroft filled out a “purchase order,” WAA Form 66. [Vineland’s Ex. “D”.]

d. “Sales Receipt” mentioned “purchases” in the name of the School District and the “price” was assured by the disposal agency (WAA-LA-12). [Instructions, Ex. A(1).]

e. The Statute itself, as indicated above, indicates such property may be “sold or leased.”

f. The applicable regulation at the time of delivery indicated “aircraft shall be disposed of only by sale.”

B. In addition to those points set forth by the Court in its decision, the following considerations are offered, further indicating the clear intention that the subject

transfer to Vineland by the Government was without reservation or exception entitling the Government to possession of the subject aircraft:

1. The intention of Congress that outright sales or leases were contemplated is indicated in House Report No. 1890:

“The conference agreement (Sec. 13) retains the provision of the House bill with respect to the donation of property having no commercial value. This is the only case in which donation is authorized. The conference agreement further provides that the Board shall prescribe regulations for the disposition of surplus property to States and their political subdivisions and instrumentalities, and to nonprofit institutions, and shall determine on the basis of need what transfers are to be made. In formulating such regulations the Board is to be guided by the objectives of the act and to give effect to the following policies to the extent feasible in the public interest:

“(1) Surplus property appropriate for educational use may be sold or leased to the States and their political subdivisions and to tax supported institutions, as well as to certain other nonprofit educational institutions.

* * * * *

“(3) In fixing the sale or lease value of property to be disposed of in each of the above cases, the Board is directed to take into consideration any benefit which has accrued or may accrue to the United States from the use of such property by any State, political subdivision, instrumentality or institution.”

Said paragraph is carried into the Act almost verbatim. (Sec. 13(a)(1)(C).)

2. Other methods of disposition are written into the Statute and quoted below and by the Government in its Brief ("Brief for the United States," p. 24), but are *not* applicable to a disposal to an educational institution. This Section 15(a) of the Statute provides in part: "The agency may disposed of such property by sale, exchange, lease, or transfer, for cash, credit, or other property, with or without warranty, and upon such terms and conditions, as the agency deems proper." Since the same Act provides in Section 13 for a method of disposal to educational institutions by "sale or lease," following the doctrine of *expressio unius est exclusio alterius*, Congress must be construed as having intended that the more restricted right of disposal to educational institutions was to be strictly adhered to. Certainly, the rule of construction that the specific provision would control the general provisions is applicable. Thus, contrary to what Government would have us believe, instead of allowing the disposal agency broad discretion as said agency may have concerning disposals to other than educational institutions, such a disposal agency is even more restricted and its provisions more mandatory in dealing with such institutions.

3. Referring to the applicable regulation 4, Section 8304.11(b)(3), "An agreement that property will not be *resold* to others within three years . . ." how could there even be a *resale* of the subject property by the District unless it was clearly *sold* to the District in the first place by the Government. Thus, the Statute not only authorizes, but appears to *demand* a sale, or at least a lease. The regulation thus requires a sale (the present case

clearly was not a lease), and ultimately the Government's agents, who are presumed to know the law and interpret it properly, executed a "sales receipt" on a disposal agency's form, used for the purpose of consummating the subject transfer.

4. The sum of Two Hundred Dollars (\$200), cash, was *paid* for said aircraft. The "sales receipt" indicates, in connection with the purchase price, that the payment of Three Hundred Dollars (\$300) (two aircraft were purchased—Two Hundred Dollars (\$200) for the subject aircraft), was "payment in full." (A conclusion may be adopted from this that future educational benefits are not even considered.)

"'Sale' means transfer of property from one person to another for a consideration of value, implying the passing of general and absolute title, as distinguished from a special interest falling short of complete ownership." (*Charlestown etc. Bank v. White* (D. C. Mass.), 30 Fed. Supp. 416, 418.)

5. In the executed WAA Form 65 Agreement, words indicating a total interest of the Government was to be conveyed clearly appear throughout said Agreement.

a. The word "transfer" appears in the heading of said Agreement and in paragraphs 3, 4, 5, 8, and on the back of said Agreement.

b. In paragraph 7, the word "sold" is used in the first part thereof, and in the second sentence "sales consummated within three years . . ."

If a sale was not contemplated by such Agreement, it would not even be possible for the educational institution to ever "sell" said property with or without the consent of the Governmental agency, as scrap or otherwise.

6. In connection with the "Release of Custody of Aircraft" [Pltf. Ex. 4], the Government, in its Brief, makes note that typed thereon is the language, "This aircraft was sold for educational purposes only." The Government, of course, stresses the educational purpose. Clearly, within said clause, however, is the lone word of transfer "sold," again indicating no rights of possession retained in the Government.

C. In answer to the Court's decision on the clear and explicit language of the subject documents, indicating no retention of proprietary interest in the Government, the Government, in its Brief, argues, in general, that the Government must get educational benefits, and, therefore, couldn't have given title to the School District without some assurance of receipt of those benefits (Brief for the United States, p. 50), and for similar reasons, the Government argues that it must thus impose restrictions (Brief for the United States, p. 38).

1. Even assuming the Government *should have* such authority, and such restrictions were imposed, and assuming further that the disposal agency *should have* done so; it clearly did *not* do so in any express language, or even by implication, when the subject agreements and documents are considered as pointed out hereinabove and by the District Court. The fact that the Government *should have* done something does not mean parties dealing in good faith with the Government are bound by this ideal, particularly when contrary language clearly appears in their agreement and memoranda thereto.

2. As previously pointed out in this Brief, it would appear more reasonable that the disposal

agency and the regulatory body at the time of executing the subject agreement and delivery of the subject aircraft to the School District was satisfied that it was obtaining full value, when the School District took the subject aircraft off its hands, paying the sum of Two Hundred Dollars (\$200) therefor. See "sales receipt" [International Ex. A-1] Government's "*payment in full.*" Further assuming that \$200 was not sufficient, the regulatory body indicated that a holding by the district for a period of three years *was sufficient* restriction and return of benefits to the Government and any rights to repossession which may have resided in the Government during said three year period would terminate.

3. Since the basis of the Government's argument is that it must be guaranteed a return of benefits through *educational use*, how can it then be argued by the Government that the Government is to get the plane back, particularly with no express or implied covenant or condition allowing re-entry or repossession. The proper remedy would have been injunction. If the argument of the Government is that it would be too difficult to fix damages for the loss of educational use, then clearly its remedy would have been to obtain an *injunction* against the School District to enforce continued educational use of the subject property. (See *infra*, VI, pp. 56-61.) At most, it would appear that only nominal damages would be due the Government for loss of educational benefits. These damages could only be nominal after a use of the subject aircraft by the School District for a period of four years as in the instant case. (*Infra*, VI, pp. 56-61.)

V.

The Government Has No Cause of Action Against Peter A. Bancroft for Inducing Breach of the WAA Form 65 Agreement Between School District and the United States. The Decision of the District Court, Dismissing the Government's Action Against Bancroft Should Thus Be Affirmed.

A. The act of inducing a breach of contract in order to constitute a tort for which damages can be recovered, must be an intentional one, and if the actor did not intend to induce a breach, he cannot be held liable, although an actual breach results from his actions.

26 A. L. R. 2d 1227, 1246;

Imperial Ice Co. v. Rossier, 18 Cal. 2d 33, 112 P. 2d 631;

Dickinson v. Samples, 104 Cal. App. 2d 311, 231 P. 2d 530.

1. An intention to induce a breach of contract is essential to the cause of action for inducing breach of contract.

26 A. L. R. 2d 1227, 1246;

Imperial Ice Co. v. Rossier, *supra*;

17 So. Cal. L. Rev. 74;

15 R. C. L. Interference (1929), 63, Sec. 24.

2. The Court below and Jury clearly found that there was no intention on the part of Appellee Bancroft to induce a breach of contract. [R. 136, 112.]

3. Bancroft did not intend to induce a breach of the WAA Form 65 Agreement by School District since he acted in good faith, in releasing possession of subject airplane to Finns, upon the belief that Finns had obtained clearance from the United States

for the sale and transfer of such plane from School District to Finns, and also said release of possession was only for the purpose of doing work thereon which could not be done at the school.

B. Whether or not it is held that Bancroft intended to induce breach of the WAA Form 65 Agreement, Bancroft was, nevertheless, privileged to induce such a breach.

1. Inducing of breach of contract is privileged and justified where the defendant seeks to perform a duty which he owes to a third person.

Caverno v. Fellows, 300 Mass. 331, 15 N. E. 2d 483;

Braden v. Perkins, 174 Misc. 885, 22 N. Y. S. 2d 144.

2. An agent is privileged to induce his principal to breach a contract. An agent or employee should be permitted to act for the economic interest of his principal or employer without having a threat of liability hanging over his head if he happens to interfere with the contract. The principal may choose to violate an agreement, and while he will be liable on the contract, no tort liability is incurred. The same freedom of choice should be given to the agent to be exercised within the scope of this authority.

Caverno v. Fellows, *supra*;

Greyhound Corp. v. Commercial Casualty Ins. Co., 259 App. Div. 317, 19 N. Y. S. 2d 239.

3. Any agency relationship furnishes an absolute privilege to the agent to induce a breach of contract by his principal.

a. *Imperial Ice Co. v. Rassier*, *supra*, referring to *Boyson v. Thorn*, 98 Cal. 578, 33 Pac. 492, states:

“It is clear that the confidential relationship which existed between the manager of the hotel and the owner justified the manager in advising the owner to violate his contract with the plaintiffs. His conduct thus being justified, it was lawful, despite the existence of ill will or malice on his part.”

b. *Hopper v. Lennen & Mitchell*, 52 Fed. Supp. 319, affirmed on this point (C. C. A. 9th) 146 F. 2d 364, 161 A. L. R. 282, held that there could be no recovery for allegedly inducing breach of contract where the action was justified by the presence of a confidential relationship between the party sued and the party influenced, who had an economic interest to protect.

C. Assuming that it be held that the School District was induced to breach of the WAA Form 65 Agreement, Bancroft is, nevertheless, not liable for damages, since Bancroft was not the proximate cause of said breach.

1. The inducing cause for the breach of said agreement, assuming there is held to be such a breach, was the solicitation by Finns of School District that said School District sell and transfer subject airplane to Finns.

a. In order to establish actionable interference with a contract, it must be shown that by reason of the defendant's wrongful act a contract which otherwise would have been performed was abandoned, that is, that there was a breach and that the defendant was the moving cause thereof.

Hill v. Progress Co., 79 Cal. App. 2d 771, 180 P. 2d 956;

Dickenson v. Samples, *supra*;
26 A. L. R. 2d 1227, 1249,

VI.

Assuming the Government Is Entitled to Judgment Against Vineland or Bancroft in This Action, the Only Proper Remedy Would Be That of Injunction or at Most Nominal Damages.

A. Assuming this Court finds that the Government has no right of possession in the subject aircraft but is entitled to judgment against the District or Bancroft, what would be the measure of damages to the Government for its actual loss on February 28, 1951 [Execution of Agreement, Vineland's Ex. B, R. 59], or April 14, 1951 (execution of Bill of Sale by Peter A. Bancroft), or July 26, 1951 (temporary transfer of physical possession to Finns)? The Government, in the trial of this action, being at a loss to show any reasonable measure of damages, has attempted to persuade the Court to fix damages on the basis of a fixed standard of market value and to determine therefrom the interest on said amount for the loss of use of said aircraft or other testimony concerning the rental value of said plane. This method of determining damages in the instant case is clearly contrary to the law for the following reasons:

1. The purposes of damages is to place the plaintiff in as good a position as if the defendant had kept the contract.

Williston on Contracts, Sec. 1338;

Restatement of Contracts, Sec. 328;

Hetzel v. Baltimore Railroad, 169 U. S. 26.

2. "In damages for breach of contract, it is performance that the injured party is entitled to and it is not the contract of which he has been wrongfully deprived by the breach but the performance of the contract."

Hollwedel v. Duffy-Mott Company, 264 N. Y. Supp. 745;

Williston on Contracts, Sec. 1339.

(a) Thus, the damages in the instant case shall be those that would naturally flow from the performance of the contract and that were in the contemplation of the parties (not mere speculation).

Here, what LENGTH OF TIME could the Government contemplate the School District would use the subject aircraft for education purposes in performing the subject WAA Form 65 Agreement [Pltf. Ex. 1]?

(1) NONE WHATEVER. Said agreement allows the School District to scrap the aircraft at *any time* after it shall have been rendered completely unfit and useless, except for its basic material content. (After the three year period, prior approval of the Government was not even necessary. Here the plane was held four years. The fact that prior approval was not necessary after the three year period would mean the District could make its *own determination* as to *rendering the aircraft unfit and useless* except for its basic material content. The word "*rendered*" would appear to indicate the District so rendering the plane unfit and useless had complete and total control and power to determine this action, even of determination as to continued educational use though it may have had such or other uses at the

time. In other words, the complete power of reduction to basic material content was in the District. Thus, here the benefits which the Government could reasonably contemplate could not exceed the value of the aircraft for continued educational use or reduced to basic material content, whichever is lower. These are the maximum duties for which the Government could demand *performance* from the District under the most favorable interpretation for the Government of the Form 65 agreement as executed.

(2) THREE YEARS. If we read the appropriate Regulation No. 4 (May 21, 1946) into said Agreement, after the three year period there would not be any demand which the Government under the contract could make against the School District. The Regulation, by placing the three year period in said Agreement, indicates also that the maximum *educational use* which the Government reasonably contemplated was said three years, and after said three year period, the Government thus did not contemplate any further educational use or benefits to the Government therefrom. Thus no damages have or could accrue after the expiration of said three year period.

Any restrictions on free alienation for a period over three years would be invalid as in violation of the objectives of the Surplus Property Act of 1944. (*Supra*, I, B, pp. 12-25.)

(b) Where damages are *purely speculative*, and there is no reasonable measure thereof, only *nominal* damages can be given. You may not fix the certainty of said damages by arbitrarily using the mar-

ket value of the subject property. Here, the Government, in an attempt to find some means of fixing the damages, which it could reasonably contemplate from the performance of the subject WAA Form 65 Agreement, has grasped at the market value of the subject aircraft. This is entirely unreasonable.

(1) In the particular instance, however, the Government *does* have a measure of damages (if anything other than injunction is available) and has so determined them in the terms of its Agreement, WAA Form 65. These damages are the one duty wherein they had a right to enforce performance upon the School District (excluding for the purposes of this argument the contrary requirements of the statute or Regulation 4); *i.e.*, to enforce the scraping of the subject aircraft and its reduction to its basic material content. Even here, however, it appears that the School District would be allowed to keep any proceeds received therefor, there being nothing in the agreement indicating to the contrary. Therefore, the only remedy of the Government would appear to be injunctive. This they have failed to request.

Even if the value of the material content is the appropriate damage value, evidence of such was not presented to the Court in this action, no valid evidence in connection therewith appears in the record. Any determination of such value would be purely *speculative*. (The Government's expert witness admitted no knowledge of the value of the aircraft in suit reduced to its basic material content. [R. 299.])

Assuming the flight restrictions are valid and do not expire in 3 years it may be argued that the Gov-

ernment should be protected against such use, *i.e.*, use by a foreign enemy, commercial use, speculative use, etc. Clearly again the remedy of the Government is injunction, not damages. In the instant case the plane is not, and never has been, in use by a foreign power, it is not, and never has been, used for commercial purposes; nor have the Finns or International Airports, Inc., nor any other person or organization made a profit or in any way benefited from any purported breach.

B. Assuming the Government is entitled to immediate possession of the aircraft in suit, since the Government obtains possession of the plane in suit, damages for the loss of the plane by the Government are not available. What damages, if any, are available to the Government for the loss of use (or other loss) of this plane in suit?

Once again the Government in an attempt to find a fixed standard upon which to base damages has grasped at fair market value of the plane in suit and based its loss upon rental value of the plane or interest on said fair market value. (The evidence shows that there was no rental value on the plane in suit in 1946 when it was transferred to the District. [Government's witness Duly, R. 292, 299.])

The Government can only expect to recover for whatever use it could enforce at the time the occurrence of the forfeiture or reverter. The Government cannot obtain damages for its loss for any greater use or performance than was contemplated by the parties as indicated in the executed WAA Form 65. (Same reasons as set forth in the above Paragraph VI, A, *supra*, pp. 56-60.) Such use, adopting the most favorable interpretation for

the Government, in the present action *re* WAA 65, was use by the District for educational purposes or basic material content, whichever was lower. There could be no rental value for an aircraft reduced to its basic material content. Thus, the loss to the Government would again be nominal or non-existent for the same reasons as set forth above in Paragraph VI, A. (*Supra*, pp. 56-60.)

The decision of the District Court should thus be affirmed in its dismissal of the action as against the Vineland School District and Bancroft if for no other reason than that the Government's action against said parties is moot or at most *de minimus*.

Conclusion.

It is respectfully submitted that the judgment below dismissing the Government's complaint as against appellees Vineland School District and Peter A. Bancroft should be affirmed, but that any portion of said Court's judgment, findings or conclusion which holds, finds or concludes or implies that any party other than Vineland School District has any right, title or interest in or right to possession of the aircraft in suit should be reversed.

Respectfully submitted,

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No. 14770

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

GEORGE C. FINN, CHARLES C. FINN, INTERNATIONAL AIR-
PORTS, INC., a Corporation, PETER A. BANCROFT and VINE-
LAND ELEMENTARY SCHOOL, DISTRICT OF KERN COUNTY,

Appellees,

and

VINELAND ELEMENTARY SCHOOL, DISTRICT OF KERN
COUNTY, CALIFORNIA,

Appellant,

vs.

UNITED STATES OF AMERICA, GEORGE C. FINN, CHARLES C.
FINN, and INTERNATIONAL AIRPORTS, INC.,

Appellees.

ANSWERING BRIEF OF APPELLEE INTERNATIONAL AIRPORTS, INC.

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No. 14770
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

GEORGE C. FINN, CHARLES C. FINN, INTERNATIONAL AIR-
PORTS, INC., a Corporation, PETER A. BANCROFT and VINE-
LAND ELEMENTARY SCHOOL, DISTRICT OF KERN COUNTY,

Appellees,

and

VINELAND ELEMENTARY SCHOOL, DISTRICT OF KERN
COUNTY, CALIFORNIA,

Appellant,

vs.

UNITED STATES OF AMERICA, GEORGE C. FINN, CHARLES C.
FINN, and INTERNATIONAL AIRPORTS, INC.,

Appellees.

**ANSWERING BRIEF OF APPELLEE
INTERNATIONAL AIRPORTS, INC.**

Statement of Pleadings and Jurisdiction.

This litigation revolves about a certain war surplus aircraft, identified as a C-46A Curtiss Commando, bearing United States Army Serial No. 42-3645, Civil Aeronautics Administration (hereinafter sometimes referred to as "CAA") registration No. N 111H (hereinafter sometimes referred to as the "plane" or the "aircraft in suit").

The jurisdictional statement by Appellant United States of America (hereinafter referred to as "the Government") in its brief is substantially correct.¹ Adding thereto, it appears that in its amended complaint the Gov-

¹Page references to the Government's brief are designated "(G.)."

ernment claimed to be the owner of the plane and entitled to its immediate possession. The Government alleged four counts: Declaratory relief (28 U. S. C., Secs. 1345, 2201, 2202); damages for breach of contract as against Appellee Vineland Elementary School District of Kern County (hereinafter sometimes referred to as "Vine-land"); damages for inducing breach of contract as against Vineland's superintendent, Appellee Peter A. Bancroft, and Appellees Charles C. Finn and George C. Finn (hereinafter sometimes referred to as "the Finns"); and for claim and delivery [Calif. Code Civ. Proc., Secs. 509-521; Fed. Rules Civ. Proc., Rule 64]. The interest of Appellee International Airports, Inc., a corporation (hereinafter sometimes referred to as "International"), in the plane arises by virtue of an aircraft lien [Calif. Code. Civ. Proc., Sec. 1208.61, *et seq.*] on the plane for labor and materials of the stipulated value of \$10,200 [R. 633-634],² and a chattel mortgage to secure a loan to the Finns of \$15,000 in cash. Seaboard Surety Company, a corporation, originally named as a co-defendant in the action, filed a disclaimer of all interest and was eliminated from further proceedings [R. 123, 124].

The Finns filed a counterclaim against the Government, the merits of which will be touched upon below only in so far as certain statements made by the Government in its discussion thereof affect the rights of International.

Statement of the Case.

The background of this case commenced to unfold in 1944. On October 3 of that year the 78th Congress enacted Public Law 456, entitled "Surplus Property Act of 1944," 58 Stat. 770. In Section 2 thereof Congress set forth its declared objectives.³ Under Section 9(a) of the

²References to the printed record are designated "[R.]."

³These objectives, together with certain other provisions of the Act are recited in Appendix B, G. 81, 82.

Act, Congress expressly directed that the formulation of regulations shall “be guided by the objectives of this Act.”

The Surplus Property Board administered the foregoing Act until September 18, 1945 (59 Stat. 533); the Surplus Property Administration took over until March 25, 1946 (Executive Order No. 9707, 11 F. R. 3149), when the War Assets Administration (WAA) became constituted. WAA administered the Act until June 30, 1949 (63 Stat. 381).

Pursuant to the authority of said Surplus Property Act, the Surplus Property Board promulgated its Regulation No. 4 governing the disposal of surplus aircraft, components and parts. This regulation became effective May 4, 1945 (10 F. R. 5460), and was amended upon three separate occasions, first, by the Board, and later by its successor agencies. At a later point⁴ we shall set forth and analyze the changes effected in Regulation 4 by these amendments, in so far as they bear upon certain of the questions presented in this appeal. It is enough here to state some of the pertinent provisions of Regulation 4 as it stood in July, 1946, when the Government disposed of the aircraft in suit. The applicable regulation became effective May 21, 1946 (11 F. R. 5868; 32 C. F. R. 1946 Supp. 8304.1 *et seq.*).⁵

Section 8304.11 of Regulation 4 governed disposals of aircraft for educational purposes. To make such disposals, it was required that the disposal agency first determine that the “surplus aeronautical property” intended for disposal be “commercially unsaleable.” The Regulation defined “aeronautical property” broadly, by words which included complete transport type aircraft [Sec. 8304.1(b)(1)]. “Commercially unsaleable property” was

⁴*Infra*, p. 24.

⁵The text of this Regulation is largely set forth in Appendix B, G. 89-95.

defined as property which has no reasonable prospect of sale at or above a minimum price established by the disposal agency, or where such minimum price has not been established, no reasonable prospect of sale except as salvage or scrap [Sec. 8304.1(b)(2)].

By the same Regulation 4 "Transport aircraft" were those which are "designed to perform or can economically be converted to perform the commercial transportation of persons or property or both" [Sec. 8304.1(b)(10)]. From the evidence [*e.g.*, Vineland's Ex. "F"] if not from common knowledge, it is undisputed that the aircraft in suit is a "transport aircraft," within the meaning of the Regulation.

Under Section 8304.7, the disposal of transport aircraft was to be made upon a consideration of various factors affecting such property. The Section concluded:

"The disposal agencies shall attempt, whenever practicable, to dispose of surplus transport type aircraft by sale rather than by lease. Transport aircraft of models approved by the Administrator, may, however, be leased by the disposal agency upon the terms approved by the Administrator; *Provided, however, That after June 30, 1946, transport aircraft shall be disposed of only by sale.*"⁶

Turning to the economic factors present, it was publicly well known that after the war the Government had tens of thousands of aircraft of all types which were surplus to its needs and available for disposal. Thousands were destroyed to prevent them from being dumped wholesale on the commercial market. Of those that remained, the Government's problem was not to retain ownership but to get rid of it. In connection with its

⁶Emphasis added throughout unless otherwise indicated. Vineland's payment for the disposal in question occurred July 10, 1946 [International's Ex. A]; delivery occurred July 25, 1946 [Govt. Ex. 5].

aircraft educational disposal program, the War Assets Administration published a form sheet of instructions, paragraph 2 of which read as follows:

“Distribution under this plan will be confined to aeronautical property which has been determined by the disposal agency to be *commercially unsaleable* by reason of its condition resulting from wear, tear, obsolescence, or otherwise, has *no reasonable prospect of sale* except as scrap, or with respect to which by reason of its large supply or prior use the estimated cost of care, handling and disposal will exceed the estimated proceeds unless it is promptly sold as scrap, or with respect to which the estimated cost of care, handling and disposal will exceed the estimated proceeds as scrap, or otherwise.”

Quantities of these aircraft having been determined administratively to be commercially unsaleable, it is not surprising to learn that those which the Government was able to sell commercially went for \$5,000,⁷ or less.⁸

Against this backdrop of legal and economic conditions, here only sketched, moved the parties to the instant litigation. War Assets Administration circularized the schools, including Vineland, in the fore part of 1946. It sent Vineland a copy of its form sheet instructions (U. S.

⁷Superintendent Bancroft testified that when he “visited the field where these aircraft were, . . . even the representatives there said, ‘Well, we are glad to see one more go, because we are sure stuck with them.’” Then occurred the following:

“The Court: I had thought it was a matter of common knowledge at the time that the Government was anxious to dispose of these aircraft as surplus.

“Mr. Abbott: Unquestionably, your Honor. Unquestionably the market was depreciated because of the large stock, but they still had commercial value, and were sold commercially at certain figures.” [R. 535.]

⁸George C. Finn testified that some of these aircraft were sold for \$2,500 [R. 880].

Government Printing Office 16-47792-1) outlining in Instruction III "How to Purchase" [Vineland's Ex. "E"]. Vineland's Superintendent Bancroft filled out an "agreement," being WAA Form 65 [Government's Ex. 1], and a "Purchase Order," being WAA Form 66 [Vineland's Ex. "D," reproduced at App. A], both dated June 25, 1946. For the aircraft in suit and a certain AT-6 aircraft (not here involved), Vineland paid the Government \$300, for which War Assets gave Vineland a "Sales Receipt," being form No. WAA-LA-12 [International's Ex. "A," reproduced at App. B], dated July 10, 1946. War Assets Administration delivered the aircraft in suit to Vineland on July 25, 1946, from a field near Ontario, California [R. 228], from whence Vineland's pilot flew it to a strip near its Sunset School [R. 228] in the Bakersfield area. With the delivery, War Assets Administration gave Vineland a "Release of Custody of Aircraft" document, being a form No. SWPD-DP 1316 [Government's Ex. 4] upon which Vineland receipted for the plane in a space marked "Purchaser."

Upon receiving the plane, Vineland used it as a classroom for over four and one-half years.⁹ Finally, in December, 1950, the Finns offered to purchase it, and their negotiations ripened into a purchase and sale of the plane

⁹In this connection, Superintendent Bancroft testified that "[u]pon receiving the aircraft, we immediately put it into use as a classroom. The students started to work on it, cleaning it up. It was very dirty after being stored in the open for a number of years, and some of the first things we did was, as I say, to clean it up. It was our firm intention never to fly it again. This was to be a classroom, and it was only of value to us as such. So we filled the gasoline tanks with water, we filled the tires with water, dug holes in the ground in the spot it was to be put in, we built concrete piers to try to save the tires from deteriorating completely by resting the wheel structures on them. We tore out bulkheads and installed forced air coolers of the type we use in the desert air country up there, and disconnected the mags. So that the engines were all completely disconnected, and the plane would be safe, as well as non-usable as a flight instrument." [R. 512.]

on February 28, 1951¹⁰ [Finding No. 3, R. 150]. The sale was effected by a written agreement between these parties of the same date [Vineland's Ex. "B"].

On April 14, 1951, Vineland delivered to the Finns a Civil Aeronautics Administration form bill of sale (Form ACA-500) for the plane [International's Ex. "A," reproduced at App. C]. This was recorded with Civil Aeronautics Administration in Washington, D. C., on April 16, 1951, upon which date the Administrator of Civil Aeronautics assigned to the aircraft the civil registry No. N 111H, and issued to the Finns an aircraft registration certificate reciting them as owners of the plane [International's Ex. "A"; Findings Nos. 4 and 7, R. 150-151].

After their purchase the Finns, assisted by a certificated airplane and engine mechanic, accomplished considerable repairs and replacements upon the plane to make it flyable [R. 272-276]. An expert witness called by the Government testified that this work added \$5,000 to the value of the plane [R. 289], which already had risen in value to \$20,000 or \$25,000 because of demand generated by the Korean War.¹¹

But flyability alone in an aircraft of this type is not enough. Its use in commercial air transportation requires that it be licensed by CAA according to the standards

¹⁰Superintendent Bancroft testified that "[t]he reason that the previous offers were turned down was that, basically, as you can see by the film, we had a classroom, very functional and popular with the students, and we wished to keep it. And until the final offer by the Finns, nobody had shown us how we could still keep a classroom there, and by offering the old airplane, which they, in the contract, agreed to completely set up so in all appearances it would be the same as the plane in suit, no one had ever done that before, and that is why we weren't interested."

¹¹This testimony by witness Douglas Duly was as follows:

"Q. What was there, from the value you placed on them at that time to the value that you placed on them in 1951, that changed their value up to the \$20,000 or \$25,000 figure? A. Supply and demand. This was a transport airplane, and the Korean war was in effect, and, nautilly, airplanes were scarce, and the value went up.

of that agency [R. 649]. The work and replacement parts required for such licensing, if the aircraft is intended for passenger use, costs approximately \$45,000 [R. 957]. To accomplish such licensing, the Finns entered into an agreement therefor on August 31, 1951, with International, an aircraft repair concern at Burbank, California [International's Ex. "E"]. Pursuant thereto International loaned the sum of \$15,000 in cash to the Finns, for which the Finns executed and delivered to International a promissory note secured by a chattel mortgage on the plane [International's Exs. "C" and "B," respectively]. At the same time and as part of the same transaction, the Finns and International entered into a written lease of the plane for a term of eighteen months commencing upon completion of the work [International's Ex. "G"]. The chattel mortgage was recorded by CAA on November 14, 1951 [Finding No. 8, R. 152].

Next, the Finns made the plane ready for flight.¹² Ac-

Although no work was done on the airplane, the actual value went up.

"The Court: When, in your opinion, did the airplane in question here come to be worth more than \$5,000, substantially more than \$5,000? At the outbreak of the Korean war?

"The Witness: No, it took, I believe six months to generate interest in that type airplane." [R. 301.]

¹²George C. Finn testified that in approximately September, 1951, "[w]e had inspected the fuel system and we had gone over the airplane to see just what parts were required, and we were picking up parts wherever we could find them during that interim until we could get ready to rehabilitate this airplane. * * * [T]here was a list that we went by for putting it in top flying shape, which was designated by the Civil Aeronautics Administration. We went through that list as a further necessary requirement, and then we knew from our own experience, in just examining the plane, that we were going to have to change the carburetors and the plugs, and these engines had not run, and we were going to have to do a lot of work to get this airplane in shape. It was sunk in the ground, with the tires deflated and worn and rotted and unusable, and we knew we were going to have to take all the rusted and deteriorated parts off and replace them, because the CAA would not let us fly it until it reached a certain technical requirement." [R. 406.]

completing this, they flew it to Lockheed Air Terminal, Burbank, where they delivered it to International [Finding No. 9, R. 152]. The plane remained in International's possession until May 25, 1952, during which time International bestowed labor and materials for its repair and improvement. The reasonable value thereof was stipulated to be \$10,200 [R. 634]. For this amount International claimed an aircraft lien under applicable California statutes [Finding No. 9, R. 152].

Although the advisory jury empanelled by the trial court found that International had "knowledge or notice" of the claims of the Government and Vineland when International loaned the money and did the work above, it also found that International acted in these matters "in good faith (believing) that defendants Finn were the true and lawful owners of the airplane in suit" [R. 113, 114]. Upon its consideration of the entire record, the trial court found as a fact that [R. 152]:

"10. Said loan was made and said labor and materials were bestowed by Defendant International in the ordinary course of its business believing in good faith that Defendants Finn were the true and lawful owners of the aircraft."

As stated by the Government in its opening brief (G. 11), differences between International and the Finns resulted in litigation in the courts of the State of California. A summary of that litigation, and the judgment, is reported in *International Airports, Inc. v. Charles C. Finn, et al.*, 132 Cal. App. 2d 293. Although International did not have a final judgment in that litigation at the time of the trial below, the judgment therein pronounced is now final.

The District Judge in the instant case, taking note of the prior jurisdiction which had attached therein by the State Court, declined to relitigate in this case the issues there presented, since such was "not essential to a deci-

sion of the other claims at bar" [R. 131]. By its judgment the trial court herein resolved the Government's claims adversely to it. The same judgment further resolved against Vineland the claims it asserted against the plane, although reserving to Vineland any claims it may have against the Finns. Finally, the trial court gave judgment to the Finns on their counterclaim against the Government [R. 159-162]. From the judgment so entered, both the Government and Vineland appeal. The questions raised by both appellants in their respective opening briefs will be answered in this brief.

Questions Presented.

I.

DID THE GOVERNMENT'S DISPOSAL OF THE AIRCRAFT IN SUIT IN 1946 PASS FULL TITLE TO VINELAND? The District Court answered the question "Yes." International contends that it should be answered "Yes."

A. The documents show a plain intent to transfer title, and such transfer was authorized by law.

B. The WAA Form 65 restrictions did not prevent title passing.

1. The restrictions are contradictory to those contained in Regulation 4, Section 8304.11(c) (32 C. F. R. 1946 Supp.), and invalid.

2. The restrictions are contrary to the provisions and objective of the Surplus Property Act of 1944 (58 Stat. 766, 50 U. S. C. App., Sec. 1611), and invalid.

3. There is no estoppel to assert invalidity of the restrictions.

4. The restrictions are merely contractual in effect, giving rise to an action for damages, if any, for their breach.

II.

DID VINELAND'S DISPOSAL OF THE AIRCRAFT IN 1951 PASS FULL TITLE TO THE FINNS? The District Court answered this question "Yes." International contends that it should be answered "Yes."

- A. The documents show a plain intent to transfer title.
- B. Vineland's transfer was authorized by law.

III.

AS A BONA FIDE PURCHASER (ENCUMBRANCER, ACCESSOR), IS INTERNATIONAL ENTITLED TO PRIOR RIGHTS IN THE PLANE? Although finding as a fact that International acted in good faith, the District Court was not required to reach this question. International contends that it should be answered "Yes."

- A. International was a bona fide purchaser
 - 1. Under the Act
 - 2. Apart from the Act.
- B. As against International, the Government is estopped to deny that it passed title to Vineland.
- C. As against International, Vineland is estopped to deny that it passed title to the Finns.
- D. International has a valid recorded aircraft chattel mortgage.
- E. International has a valid aircraft lien.
- F. International has prior rights by accession.

ARGUMENT.

I.

The Government's Disposal of the Aircraft in Suit in 1946 Passed Full Title to Vineland.

A. The Documents Show a Plain Intent to Transfer Title and Such Transfer Was Authorized by Law.

The aircraft in suit admittedly was disposed of under the Surplus Property Act of 1944, as amended (58 Stat. 765), and Regulation 4 (32 C. F. R. Supp. 1946, Sec. 8304.1 *et seq.*) governing aircraft disposal.

Under the statute, disposal for educational use may be only by sale or lease (Sec. 13(a)(1)(A)). That section provides in part that:

“Surplus property that is appropriate for school, classroom or other educational use may be *sold or leased* to the States and their political subdivisions and instrumentalities”

The intention of Congress is further emphasized in House Report No. 1890, 78th Congress, 2nd session, page 25:

“The conference agreement (Sec. 13) retains the provision of the House bill with respect to the donation of property having no commercial value. This is the only case in which donation is authorized. The conference agreement further provides that the Board shall prescribe regulations for the disposition of surplus property to States and their political subdivisions and instrumentalities, and to nonprofit institutions, and shall determine on the basis of need what transfers are to be made. In formulating such regulations the board is to be guided by the objectives of the act and to give effect to the following policies to the extent feasible in the public interest:

“(1) Surplus property appropriate for educational use may be *sold or leased* to the States and their political subdivisions and to tax supported institutions,

as well as to certain other nonprofit educational institutions.

* * * * *

“(3) In fixing the *sale or lease* value of property to be disposed of in each of the above cases, the Board is directed to take into consideration any benefit which has accrued or may accrue to the United States from the use of such property by any State, political subdivision, instrumentality or institution.”

The Government's quotation of only a part of the above paragraph (3) in its brief (G. 40, footnote 28) fails to give the court the benefit of the full meaning therein expressed. Said paragraph is carried into the Act almost verbatim (Sec. 13(a)(1)(C)).

Other methods of disposition are written into the Act, but we believe that they are inapplicable here. Section 15(a) provides in part:

“Notwithstanding the provisions of any other law but *subject to the provisions of this Act*, whenever any Government agency is authorized to dispose of property under this Act, then the agency may dispose of such property by sale, exchange, lease, or transfer, for cash credit, or other property, with or without warranty, and upon such other terms and conditions as the agency deems proper. . . .”

Thus Section 15 is expressly subject to the other provisions of the Act, including Section 13. Section 13 is entitled “Disposal to local governments and nonprofit institutions.” As we have seen, it specifies its own methods of disposal: *sale or lease*. Moreover, Section 13 relates only to “surplus property” as defined by the Act (Sec. 3(4)). Section 15 relates to any “property” as defined by the Act, meaning “property of any kind” (with certain exceptions) (Sec. 3(d)). Section 15 deals with disposal by any Government agency, and follows a section dealing with disposition by any “owning agency.” Sec-

tion 13 and Regulation 4 deals with disposal by the "disposal agency," a much more limited term (see Secs. 3(a), (b) and (c)).

It is a well established rule of statutory construction that specific provisions govern general provisions (cases collected in 59 Fed. Dig. 194). Accordingly, we submit that Section 15 has no place in this action. And since there is no contention that the Vineland transaction was a *lease*, it could only be valid as a sale under Section 13.

Moreover, the Regulations required a sale of the airplane in suit. Section 8304.7, as we have seen,¹³ provided in part that "*after June 30, 1946, transport aircraft shall be disposed of only by sale.*" We have also established that the sales receipt for the aircraft in suit bears date July 10, 1946 [International's Ex. "A"], and that N 111H is a transport aircraft [R. 301].

In its brief (G. 38, footnote 27) the Government argues that Section 8304.7 "has no bearing on the instant transaction," but relates instead to disposals into commercial channels. Nothing in said section compels such conclusion. Both Section 8304.7 and its companion section, 8304.6, deal with methods of disposal for the particular type aircraft each deals with. Section 8304.6 deals with and is entitled "Disposal of tactical aircraft." Section 8304.7 deals with and is entitled "Disposal of transport aircraft." Both "tactical aircraft" and "transport aircraft" are embraced in the more comprehensive term "aeronautical property," as defined in Section 8304.1(b) (1), and used in Section 8304.11(a) dealing with educational disposals. Significantly, Section 8304.6 *expressly* considers the educational market, among others, in arriving at its determination.¹⁴ Is it then wrong to as-

¹³*Infra*, p. 4.

¹⁴"Sec. 8304.6. *Disposal of tactical aircraft.* (a) Aside from a relatively small demand for tactical aircraft to serve specialized industrial, *educational* and private uses, there is no significant market for aeronautical property of this class." (G. 91.)

sume that the same framers had in mind the educational market, among others, when they formulated Section 8304.7? We think not. And when this section tells the disposal agencies "That after June 30, 1946, transport aircraft shall be disposed of only by sale," this mandate on its face and by application applies to *all* transport aircraft, including the aircraft in suit.

Nor is there anything inconsistent with this mandate in Section 8304.11. The Government claims there is, because Section 8304.11 "carefully uses the term 'disposal' and 'to dispose' rather than the terms 'sale' or 'to sell'" (G. 38). *This proves nothing.* The term "disposal" is used throughout Regulation 4, witness Sections 8304.2, 8304.4, 8304.6, 8304.7, 8304.8, 8304.9, 8304.10, 8304.11, 8304.14, 8304.15, 8304.17, 8304.54 (see G. 89-95). In fact there is hardly a provision in Regulation No. 4 that does not speak of "disposal" of surplus property whether it be a sale, lease, or other transfer. Further contrary to the Government's said claim, Section 8304.11 *does* contain other indicative words, *i.e.*, "prices," "resold," and "date of purchase," which are consistent only with the concept of a sale. This is but right, since Section 8304.11 exists under Section 13(a)(1)(A) of the Act, authorizing only "sale or lease." Subsection (b) of Section 8304.11 provides:

"The disposal agency shall establish procedures pursuant to which educational . . . institutions or instrumentalities may make written application for surplus aeronautical property available for disposal to such institutions or instrumentalities. Such procedures shall include (1) a certification that the applicant is an educational . . . institution or instrumentality as defined in Sec. 8304.1, (2) a certification of the purposes for which the property is to be acquired, and in the case of aircraft an agreement that it will not be flown except for purposes of research or experiment in connection with the

science of aeronautics, and (3) *an agreement that the property will not be resold to others within three (3) years of the date of purchase without the consent in writing of the disposal agency unless it is mutilated or otherwise rendered unfit for use except as scrap.*"

How could the property *ever* be resold if it never was sold in the first place?

The Government stresses the fact that transfer of the airplane was under its Exhibit 1, the WAA Form 65 agreement. We shall have more to say about this agreement at a later point, but for purposes of this discussion it is entirely inaccurate to consider or even intimate that Exhibit 1 is a transfer document of any kind. It exists by virtue of Section 8304.11(b) of Regulation 4. Yet that section nowhere provides for such a document as a *transfer document*, only as a "written application" which *shall include* "an agreement that the property will not be resold to others within three (3) years"

Plaintiff's Exhibit 1 itself bears out the fact that it is not a "transfer document." It recites that:

"In consideration of the transfer of certain items of Aeronautical Property, under provisions of Surplus Property Act of 1944, Public Law 457 Vine-land Elementary School District located at Rt. 6, Box. 207, Bakersfield, Calif., hereby certifies and agrees as follows:"

Thus the transfer is wholly independent of the agreement. It is not even subject to the agreement. It is the *consideration for the agreement*. It is the *quid*; the agreement is the *quo*. Further, note the use of the word "transfer." This word itself has a commonly accepted legal significance, as follows:

(1) Bouvier (1934): "The act by which the owner of a thing delivers it to another person, with

the intent of passing the rights which he has in it to the latter.”

(2) Black, 4th Edition (1951): “An act of the parties or of the law by which the title to property is conveyed from one person to another. (Citations.) Alienation; Conveyance, 2 Bl. Comm. 294.”

(3) Wharton (1938): “To convey; to make over to another, the document by which property, as shares in public companies, is made over by one to another.”

The trial court, noting that a *transfer* was intended, saw no reason to construe it as something different from or less than precisely that [R. 344-347].

What then was the transfer document? It appears as a “sales receipt,” a copy of which is part of International’s Exhibit “A.” The Government contends that title never passed because there was no bill of sale (G. 39). But here the Act authorized a sale, the Regulation *required* a sale and spoke in terms of a sale, and the Government’s agents, purporting to obey the law, executed and delivered a “Sales Receipt,” being a War Assets Administration form used to effectuate such law.

Said sales receipt recites Peter Bancroft “Purchaser or Authorized Representative,” “For purchase in name of Vineland School District.” It bears date July 10, 1946, and is executed in the name of War Assets Administration. We do not believe that the Government can fairly say that its sales receipt was not delivered for moneys received for a *sale*. The mere recitation of a different contention under the facts here denies the plain meaning of the words used in the instrument.

Even the “Release of Custody” document [Government’s Ex. 4] upon which the Government relies (G. 39) confirms that a sale of the plane was intended, and occurred. For on its face appears: “This aircraft was sold for educational purposes only,” “S/P 200.00,” and a receipt for the aircraft by Vineland as the “Purchaser.” “S/P” is a common abbreviation of “selling price.”

The Government observes that "The district court placed considerable stress on the fact that words such as 'price,' 'sell,' 'sold,' and 'purchase' were used in the various documents, other than WAA Form 65, which described the transfer to Vineland" (G. 40-41). We ask simply, "why not?" Nothing in *Williston on Sales*, Sections 7, 8 (1948 Ed.), cited by the Government at that point, compels or even suggests that a contrary conclusion would be proper on the facts here present.

Since WAA delivered Vineland a sales receipt naming Vineland as "Purchaser" of the airplane, and had it sign a receipt for the plane on a document prepared by WAA, and upon which WAA likewise described Vineland as the "purchaser," the conclusion appears inescapable that the Government "sold" and Vineland "purchased" the plane, and that, accordingly, full title passed thereby.

Nor is the legal effect of a sale altered by the fact that Vineland paid only \$200.00 for the plane, as the Government insists (G. 39). The Act required that "(i)n fixing the sale or lease value of property to be disposed of . . . the Board shall take into consideration any benefit which has accrued or *may accrue* to the United States from the use of such property by any such . . . institution" (Sec. 13(a)(1)(C)). Section 8304.1 (a) of Regulation 4 required the disposal agency to "ascertain fixed prices which will reflect" such benefit. This was done by Order No. 4 of January 31, 1946, made a part of Regulation 4, as amended.¹⁵ The determination therein recited a price of \$200.00. *That price, then, reflected the entire benefits which have accrued (in July, 1946) or may accrue to the United States.* There was no further consideration to be exacted.

¹⁵As published in the Federal Register (11 F. R. 5868), the order promulgating Regulation 4 states in part: "Order 4, January 31, 1946 (11 F. R. 1471) under this part shall remain in full force and effect."

Even though the Government was able to sell some of these aircraft to private users in 1946 for \$5,000, the Government received from Vineland as full consideration (1) \$200 in cash, (2) past benefits (the nature of which are not spelled out in Order No. 4 but which said order administratively has found to exist), and (3) the *possibility* of future benefits from the use of the plane by Vineland (since both the Act and the Regulation both use the words "may accrue"). The value of these three items *together* was the consideration bargained for. As it turned out, the Government received a substantial benefit from item (3) above, since Vineland in fact used the plane as an aeronautical classroom for over four and one-half years.

In the case of *United States v. Jones* (CCA-9), 175 F. 2d 278, Jones bought property including about \$60,000 worth of gears from War Assets Administration for \$75. The Government sued to rescind. Held, for Jones. The court states:

" . . . He paid value, the price asked. *United States v. Des Moines River Nav. & R. Co.*, 1892, 142 U. S. 510, 530, 12 S. Ct. 308, 35 L. Ed. 1099. If, in the face of this, and in the absence of fraud or venality on the part of its agents, *Hume v. United States*, 1889, 132 U. S. 406, 10 S. Ct. 134, 33 L. Ed. 393, the Government could question the transaction, the aims of the statute would be thwarted. The statute contains no limitation. And, as limitations do not run against the Government, no title would ever be secure against the Government, no title would *ever* be secure against attack.

"It is inconceivable that the Congress would have subjected the purchasers, its former soldiers and independent business men, to whom it gave preference as buyers, 50 U. S. C. A. Appendix, Sec. 1161(c, f), to such danger, unlimited in time. Mark well. The Government was not aiming to drive hard bargains

with the purchasers of this surplus property. It was not seeking to sell, at a profit, in competition with private industry, or to break even. To use Hotspur's phrasing, the Government was not 'in the way of bargain' caviling 'on the ninth part of a hair.' Rather, like him, in dealing with the property, the Government, in its largess, was willing to

" 'Give thrice so much * * *

To any well-deserving friend.'

"Shakespeare, 1 Henry IV, Act III, Sc. 1.

"Nowhere in the statement of objectives is recovery of cost or value mentioned as a basis for disposition. And when it speaks of prices at all, it refers to 'fair prices to the consumer.' 50 U. S. C. A. Appendix, Sec. 1611(m). Rightly, For the chief aim was to use the surplus property in helping the country, as a whole, pass from a war economy to a peace economy with as little dislocation and as painlessly as possible. The Government could assist in the attainment of this object by standing behind its selling agents and giving finality to certain of their written instruments by which title to property passed."

Likewise, Vineland "paid value, the price asked." We submit that Vineland and its transferees should be similarly protected.

B. The Restrictions in WAA Form 65 Did Not Prevent Title From Passing.

1. THE RESTRICTIONS ARE CONTRARY TO THE PROVISIONS AND OBJECTIVES OF REGULATION 4, SECTION 8304.11(b) (32 C. F. R. 1946 SUPP.), AND INVALID.

WAA Form 65 [Government's Ex. 1], paragraph 7, provides:

"That all acquired property when unfit for the above purpose will be sold only as scrap and then

only after it shall have been rendered completely unfit and useless except for its basic material content. Sales consummated within three (3) years of the date of acquisition must have the prior approval of the Disposal Agency.”

We have seen above that Section 8304.11(b) provided in part that the disposal agency’s procedures “shall include . . . (3) an agreement that the property will not be resold to others within three (3) years of the date of purchase without the consent in writing of the disposal agency unless it is mutilated or otherwise rendered unfit for use except as scrap.”

A comparison of what the Regulation says that the Procedures “shall include,” and what the Form 65 agreement does include immediately strikes the reader with two vital discrepancies, which may best be illustrated as follows:

Regulation 4, Section
8304.11(b)

WAA Form 65

- | | |
|---|---|
| (1) Requires an agreement which in effect would not restrict the right to resell after 3 years. | (1) Omits this entirely. |
| (2) Requires an agreement which in effect would permit resale <i>within</i> 3 years (and <i>semble, a fortiori</i> after 3 years) provided the material is “mutilated or otherwise rendered unfit for use except as scrap.” | (2) Changes this to require that the aircraft be rendered “completely unfit and useless except for its basic material content.” |

“Scrap” is defined in the Regulation (Sec. 8304(1)(b)(4)) as “property that has no reasonable prospect of sale except for its basic material content.” Thus an

airplane can be rendered (or *be*) unfit for use, meet the test of "scrap," and by the addition of an unusual amount of work, labor and materials, justified by special situations such as the Korean War, be rehabilitated for flight. It was found and declared to be "scrap" under the regulation, and the regulation required the agreement above stated.

Since the Regulation is most explicit in requiring that the agency's procedures shall include an agreement the terms of which are clearly set forth, we do not see how those procedures can omit this agreement and attempt to substitute another one perhaps more to the liking of some of its officials.

It is no answer to say that the Regulation merely set "minimum conditions" (G. 35). Certainly, procedures in addition to the three set forth in the Regulation could have been, and were, included, *e.g.*, paragraph 4 of WAA Form 65 relieving War Assets Administration of certain responsibility. The disposal agency could have established any number of procedures, provided that it "shall include" the three which were expressly spelled out in the Regulation. To that extent the Regulation *did* set minimum conditions. They were minimum in the sense that with respect to the matters covered, the Regulation defined and specified the sole measure of the requirement.

Gilbert & Secor v. United States, 75 U. S. 358 (1869), cited by the Government (G. 35-36) is not in point. There the Act specified that the contract price "should not exceed by ten per cent" the submitted bid price. Clearly, this left the price open under this top limit, and it was so held.

Instead, we believe to be analogous the case of *Priebe & Sons v. United States*, 332 U. S. 407 (1947). There plaintiff signed a contract with the Government to furnish dried eggs for lend-lease during the war. The contract called for delivery on a date certain, and provided liquidated damages for failure to complete performance

on time. The Government deducted such liquidated damages for a claimed default. Held, for plaintiff. Since Congress nowhere provided for liquidated damages, such a provision cannot be given effect. The provision was stricken despite the fact that Congress had authorized the agency to procure the goods "under appropriate terms and conditions."

In the instant case the "scrap warranty" clause as it appears in WAA form 65 [Government's Ex. 1] is not only unauthorized, it is in direct violation of what the regulation says the disposal agency procedures "shall include." If the Board intended the provision to be as written in WAA Form 65, then it presumably would never have written the provision as it did in Regulation 4.

In its brief (G. 32) the Government charges that the trial court by its holding "in effect overrides the consistent construction¹⁶ of the administrative agency which issued both Regulation 4 and Form 65," that Form 65 was valid, and by "so ruling, the court below failed to follow established principles in this area." The answer to this is twofold:

First, as pointed out by the trial court, it is "the settled rule that a valid administrative regulation binds the administrator himself equally with others [United States ex rel. Accardi v. Shaughnessy, *supra*, 347 U. S. 26; Chapman v. Sheridan-Wyoming Co., 338 U. S. 621, 629 (1950); Bridges v. Wixon, 326 U. S. 135, 153 (1945); see Jeffries v. Olesen, 121 F. Supp. 463, 476, (S. D. Cal. 1954)], the same as though the provisions of the regulation were prescribed in terms by the statute.

¹⁶Since paragraph 7 of Form 65 speaks of "sold" and "sales", the sale concept was the agency's *contemporaneous* construction of the word "disposal" in Section 8304.11. To this extent the district court's holding did not "override" the agency but conformed thereto.

[Atchison, T. & S. F. Ry. v. Scarlett, 300 U. S. 471, 474 (1937).]"

The second answer to the Government's contention is that the "established principles" declared in *Bowles v. Seminole Rock & Sand Co.*, 325 U. S. 410, and relied upon by the Government (G. 32) make an exception where the administrative interpretation "is plainly erroneous or inconsistent with the regulation." The District Court has held, and we believe we have already pointed out where such inconsistency exists. That there was administrative error can likewise be demonstrated.

The plain fact is as was found by the trial court: "[T]he printed Form 65 . . . did not contain the restrictions [of the current regulation], but contained instead the terminology of a superseded regulation."¹⁷ To demonstrate this, we first set forth choronologically the development of the pertinent section¹⁸ as follows:

(1) Regulation 4, effective May 4, 1945 (10 F. R. 5460) Section 8304.4(c):

" . . . (c) the Buyer shall file with the Disposal Agency a certificate under oath, duly notarized that such buyer is an educational institution, as defined in Section 8304.1(e), that the property is being acquired to be used only for non-flight instructional, research or experimental purposes, that it will not be used for any flight purposes, and that the property will be disposed of only as scrap and then only after it shall have been rendered completely unfit and useless except for its basic material content."

(2) Regulation 4, effective August 10, 1945 (10 F. R. 10362), Section 8304.4(c):

¹⁷From opinion of the district judge [R. 113].

¹⁸The Government's footnote 24 cites two earlier versions, but omits the third (11 F. R. 179), which was the immediate predecessor of the current one.

“ . . . (c) the Buyer shall file with the Disposal Agency a certificate under oath, duly notarized that such buyer is an educational institution, as defined in Section 8304.1(e), *or a State or local government as defined in Section 8304.1(i)*, that the property is being acquired to be used only for non-flight instructional, research, experimental *or memorial* purposes, that it will not be used for any flight purposes, and that the property will be disposed of only as scrap and then only after it shall have been rendered completely unfit and useless except for its basic material content.” (Italicized matter denotes changes.)

(3) Regulation 4, effective December 21, 1945 (11 F. R. 179), Section 8304.11(b):

“(b) *The disposal agency shall establish procedures pursuant to which educational . . . institutions or instrumentalities may make written application for surplus aeronautical property available for disposal to such institutions or instrumentalities. Such procedures shall include a certification that the applicant is an educational . . . institution or instrumentality as defined in Sec. 8304.1, a certification of the purposes for which the property is to be acquired, an argeement that the property will not be resold to others within three (3) years of the date of purchase without the consent in writing of the disposal agency unless it is mutilated or otherwise rendered unfit for use except as scrap.*” (Italicized matter denotes changes.)

(4) Regulation 4, effective May 21, 1946 (11 F. R. 5868), Section 8304.11(b):

“(b) The disposal agency shall establish procedures pursuant to which educational . . . institutions or instrumentalities may make written application for surplus aeronautical property available for disposal to such institutions or instrumentalities.

Such procedures shall include (1) a certification that the applicant is an educational . . . institution or instrumentality as defined in Sec. 8304.1, (2) a certification of the purposes for which the property is to be acquired, *and in the case of aircraft an agreement that it will not be flown except for purposes of research or experiment in connection with the science of aeronautics*, and (3) an agreement that the property will not be resold to others within three (3) years of the date of purchase without the consent in writing of the disposal agency unless it is mutilated or otherwise rendered unfit for use except as scrap.” (Italicized matter denoted changes.)

Thus, the first broad change in the Regulation’s “scrap warranty” requirement came with the December 21, 1945 amendment. Prior to that, aircraft disposals were made under R.F.C. Form No. SWFD-DP-35, the “Form 35” agreement [*e.g.*, Finns’ Ex. B]. *But when the regulation changed its “scrap warranty” requirement, the disposal form did not change.* The Form 35 agreement followed the May 4, 1945 version *verbatim*; *it was not even revised to accommodate the August 10, 1945 amendment.* Thus, that amendment (1) permitted a State or local government to acquire, and (2) permitted acquisition for memorial purposes; but Form 35 embodies neither change.

When the Surplus Property Board transferred the disposal functions of Reconstruction Finance Corporation to War Assets Administration, War Assets was charged with all the regulations of the Surplus Property Board, including Regulation 4. Educational disposals were then made under the WAA Form 65. But the scrap warranty provisions (par. 7) of Form 65 were nearly identical to those in the Form 35 agreement, which in turn were identical to those in the first Regulation 4 of May 4, 1945. A comparison of paragraphs 6, 7, and 8 of the two forms is illustrative:

Form 35

- "6. That the acquired property will not be used for any actual flight purposes.
- "7. That all acquired property when unfit for the above purpose will be *sold* only as scrap and then only after it shall have been rendered completely unfit and useless except for its basic material content.
- "8. That this Agreement shall be effective for all future transfers of Aeronautical Property under the provisions of Surplus Property Board Regulation No. 4, as amended from time to time."

Form 65

- "6. That the acquired property will not be used for any actual flight purposes.
- "7. That all acquired property when unfit for the above purpose will be *sold* only as scrap and then only after it shall have been rendered completely unfit and useless except for its basic material content. *Sales* consummated within three (3) years of the date of acquisition must have the prior approval of the Disposal Agency.
- "8. That this Agreement shall be effective for all future transfers of Aeronautical Property under the provisions of Surplus Property Administration Regulation No. 4, as amended from time to time."

The only change of note is the addition to Form 65 of the requirement of prior approval for sales made within three years. If this was intended as compliance with the mandate of the December 21, 1945 amendment to Regulation 4, it falls far short of it, as a comparison of the two readily shows.

Indeed, paragraph 6 of Form 65 restricting against use for flight purposes did not even reflect the May 21, 1946 amendment above to Regulation 4 which *permitted flight* for purposes of research or experiment. Can the Government in good conscience contend that these too are but minimum standards which the Surplus Property Board has promulgated by authority of the Congress, but which War Assets Administration officials purporting to act thereunder need not follow? We believe not; nor should the result be any different where the Regulation requires a change in paragraph 7 of Form 65, and that form fails to comply.

Although in a disrelated field, analogy may be found in a recent California case, *Adoption of McDonald*, 43 Cal. 2d 447. There, the Holy Family Adoption Service, a licensed agency, placed a child with petitioner and her husband under an agreement signed by both giving the agency "the right to remove the child previous to legal adoption if at any time the circumstances made it necessary to do so." The agreement was prescribed by regulations of the Department of Social Welfare, which was authorized by statute to make regulations for child placement. Petitioner's husband committed suicide, and the agency demanded return of the child. Petitioner refused, and filed a petition for adoption, which the agency contended should be denied because of its refusal to consent. The trial court granted the petition. Held, affirmed. The agreement was not binding. After analyzing the statutory language, the court states (p. 466):

"[The Department of Social Welfare] has no power by regulation or otherwise to add to or detract from the rules for adoption prescribed in the Civil Code (citations). Thus, neither appellant [the agency], the department [of Social Welfare], the county agency [Los Angeles County Bureau of Adoptions], nor any private agency had the right by regulation or by agreement to deprive her of the

right granted her by section 226 of the Civil Code . . . The statutory provisions governing adoptions cannot be so circumvented.”

We believe that on principle the same rule applies wherever an administrative agency attempts by agreement or otherwise to add to or detract from controlling law, whether that law is by statute, or by regulation as in the instant case. Vineland had a right conferred by Section 8304.11(b) of Regulation 4 to resell the aircraft in suit *free from any restriction*, after three years. If the foregoing analogy is sound, no official of War Assets Administration by Form 65 [Government's Ex. 1] or otherwise, could deprive Vineland of that right. To paraphrase the California court, “The regulatory provisions governing educational disposals cannot be so circumvented.”

Further support may be found for this conclusion in the development of the “scrap warranty” clause of Regulation 4 itself. The May 4, 1945, version required a “*certificate . . . that the property will be disposed of only as scrap . . .*” (Note that the Form 35 also uses the word “sold,” indicating the agency's contemporaneous construction of “disposed”); the December 21, 1945 amendment required “an *agreement* that the property will not be *resold* to others within three (3) years . . .” The May 21, 1946 amendment reincorporated the same language, emphasizing it if anything by specifically numbering it as a separate item “(3)” *in the regulation*.

A *certificate* is unilateral. An *agreement* is, of course, bilateral or multilateral. The change in use of words is striking. Does this not bind the agency to *offer* on behalf of the Government the terms which Regulation 4 says must be *agreed to*? If so, these are not minimums: they are the *only* terms permitted with respect to the subject they cover.

For the foregoing reasons, we submit that Form 65 is contrary to Regulation 4, and invalid.

2. THE RESTRICTIONS ARE CONTRARY TO THE PROVISIONS AND OBJECTIVES OF THE SURPLUS PROPERTY ACT OF 1944 (58 STAT. 766, 50 U. S. C. APP. 1611), AND INVALID.

As has been stated by this court,¹⁹

“ . . . This is not a casual statute, enacted in haste to cover an unexpected situation. The statute became effective on October 3, 1944, at a time when the tide of the War was turning. The Congress anticipated that the early end of hostilities would find many Governmental agencies in possession of property intended ‘for war purposes and common defense,’ and which, no longer needed, would become surplus. They, therefore, devised a comprehensive scheme for disposing of the property in a most effective manner, and in conformity with their conception of the American way of life, which they set forth in twenty avowed aims, 50 U. S. C. A. Appendix, Sec. 1611(a) to (t).”

Among these objectives are the following:

“(b) to give maximum aid in the re-establishment of a peacetime economy of free independent private enterprise, the development of the maximum of independent operators in trade, industry, and agriculture, and to stimulate full employment; . . .

“(c) to facilitate the transition . . . of individuals from wartime to peacetime employment;

“(d) . . . to strengthen and preserve the competitive position of small business concerns in an economy of free enterprise;

* * * * *

¹⁹*United States v. Jones* (CCA-9), 175 F. 2d 278.

“(f) to afford returning veterans an opportunity to establish themselves as proprietors of . . . business . . . enterprises;

* * * * *

“(k) to foster the wide distribution of surplus commodities to consumers at fair prices;

“(l) to effect broad and equitable distribution of surplus property;

“(m) to achieve the prompt and full utilization of surplus property at fair prices to the consumer . . .

* * * * *

“(o) to promote production, employment of labor, and utilization of the productive capacity . . .

“(p) to foster the development of new independent enterprise;

* * * * *

“(r) to dispose of surplus property as promptly as feasible without fostering monopoly or restraint of trade, or unduly disturbing the economy, or encouraging hoarding of such property, *and to facilitate prompt redistribution of such property to consumers;*

“(s) *to dispose of surplus Government-owned transportation facilities and equipment in such manner as to promote an adequate and economical national transportation system; . . .*”

At the foot of the list is the following:

“(t) except as otherwise provided, to obtain for the Government, as nearly as possible, the fair value of surplus property upon its disposition.”

In the instant case the trial court stated:

“It is seen that the stated objectives of the Act are replete with references to ‘free independent private enterprise,’ ‘independent operators,’ ‘small business concerns,’ ‘afford[ing] returning veterans an opportunity . . . as proprietors,’ and ‘new en-

terprises.’ Defendants Finn wanted to do these very things; their objective was to operate the airplane in suit themselves as a new and independent and free private enterprise.²⁰

“The provision of subsection (2) of Regulation Sec. 8304.11(b), prohibiting flight of the airplane ‘except for purposes of research or experiment’ runs directly counter to the Congressional objectives expressed in the statute. Being contrary to, rather than in accordance with, ‘the provisions . . . [and] objectives of this Act,’ the regulatory provision in question is invalid. Comparable provisions of Form 65 are *pari ratione* invalid as well.

“Like considerations of reason and policy raise doubts also as to the validity of the limitations on disposal contained in above-quoted subsection (3) of the regulation, but it is not necessary to resolve them here. The three-year restriction on unfettered disposal having expired at the time of the sale to defendants Finn, the School District was free to sell the aircraft as such without violating the provisions of subsection (3) of the regulation.”

Opposing this, the Government states (G. 23) that Section 9 of the Act “clearly authorizes the Board and the disposal agency to dispose of property in whatever manner appropriate in the circumstances presented so long as the disposal technique is not otherwise prohibited or contrary to the Act’s purposes.” Remembering that Section 13 governs disposals to educational institutions, and that Section 13(a)(1)(A) provides that such prop-

²⁰George C. Finn testified that “[w]e wanted to start our own airplane business, and we were very anxious to get this airplane in the air, so we spent all of our spare time outside of school hours planning our use of this airplane.” And the court found as a fact that “[t]he intention of Defendants Finn in so purchasing said aircraft was to use it for commercial flight purposes and establish themselves as proprietors in a new independent enterprise in the field of air transportation.” [Finding No. 6, R. 151.]

erty may be “sold or leased,” Section 9 offers no comfort to the Government. For that section not only provides that “In formulating its regulations, the Board shall be guided by the objectives of the Act,” but also that such regulations “may, *except as otherwise provided in this Act*, contain . . . terms and conditions under which, surplus property may be disposed of” Thus it is clear that since Section 13 *does* otherwise provide, that section controls. The regulation may not replace or run counter to the methods there specified. Nor may it run counter to the objectives of the Act.

The Government goes on to assert that its Form 65 restrictions “are not only permitted but are almost compelled by the Act. Congress wanted to insure that the property would be put to its most effective use (see Section 2(a), *infra* p. 81).” In the Government’s brief, Section 2(a), *infra*, page 81, refers to Section 2(a) of the Act. But this section, reciting one of the Act’s objectives, provides:

“to assure the most effective use of *such property for war purposes and the common defense.*”

Considered in context, this expresses a much more pointed intention by Congress. It is not defeated by using the plane in commercial carriage, since it is common knowledge that all commercial planes, like ships, are standby facilities in time of war.

The Government then insists that the Act’s objectives 2(h), (j), (m), and (q) afford a statutory basis for prohibiting Vineland from using the plane for flight, or selling it without reducing it to its basic material content (G. 24).

We question this. There is no claim that Vineland was a speculator when it acquired the plane in 1946, or that it did so for speculative purposes (Sec. 2(h)). Its use as a classroom for over four and one-half years disproves this. Moreover, the Finns bought the plane

from Vineland in 1951 for approximately its fair market value.²¹

Nor was resale of some of these school aircraft without first smashing them to basic material content calculated to dislocate the domestic economy or international economic relations (Sec. 2(j)). It is common knowledge that most airplane manufacturers are and for several years past have been backlogged with orders for new aircraft against commercial and military demand. Even speaking as of 1946, the three-year restriction required by the regulation has a *reason*, considering aircraft conditions at that time. A restriction "for educational purposes so long as usable," as claimed by the Government (G. 24), is pure caprice so far as it is attempted to be justified by this record.

Nor are resales, such as here, calculated to do otherwise than "to achieve the prompt and full utilization of surplus property at fair prices to the consumer . . ." (Sec. 2(m)). The Form 65 restrictions, if given effect, would accomplish just the opposite. A three-year restriction required by the regulation appears to have been formulated "with due regard for the protection of free markets and competitive prices from dislocation resulting from uncontrolled dumping." An unlimited restriction, if required by WAA Form 65, is not.

Nor is there anything in the disposal to Vineland in 1946 which would give rise to "unusual or excessive profits," absent the unlimited restrictions recited in WAA Form 65. If the Government could not sell all its surplus C-46 aircraft in 1946 to commercial users for \$5,000 each, as testified, there is no reason to believe that schools could have done better, at that time. Add the cost of ferrying the aircraft in suit, readying it

²¹The Finns alleged in their counterclaim that \$21,000 was paid for the plane [R. 104]. Its fair market value at that time was \$20,000 [R. 150].

for classroom purposes, maintaining it for four and one-half years as here, and where is the “unusual or excessive profit”? The profit, if any, to Vineland comes not from the disposal in 1946, but from the market conditions generated by the Korean War in 1950 and general stimulation of air transportation. If the Government could retake its surplus aircraft because of this factor, no title to surplus property would *ever* be safe; all would be open to question on the possible ground that the Act had not been complied with (see *U. S. v. Jones*, CCA 9, 175 F. 2d 278).

The Government points to Section 13(a)(2) of the Act, which provides in part:

“Surplus property shall be disposed of so as to afford * * * educational institutions * * * an opportunity to fulfill, in the public interest, *their legitimate needs.*” (Italics in G. 25.)

It says “disposals to educational institutions were to fulfill their needs alone, not the needs of others.” (G. 25). We agree. But who shall determine when the school’s legitimate needs for the equipment have been fulfilled, a federal agency or the school itself? In the American way, the question is self-answering. And that is just what Vineland did here in disposing of the plane to the Finns.²²

Moreover, agency officials assume much when they contend that their restrictions, unlimited as to time, are justified because they are “more favorable” for the Government. Not only have they presumed upon the authority of Congress and the Board which Congress constituted to prescribe regulations, but their conclusion itself is not wholly free from doubt. The Board in Regu-

²²“Q. And assuming that Exhibit B had been complied with, then in that event would Vineland’s legitimate needs for the aircraft have been fulfilled? A. (By Superintendent Bancroft): That is correct.” [R. 537.]

lation 4 having considered three years sufficient to accomplish the desired purpose, it is hardly reasonable for other officials, not authorized to do so by the Act, to substitute their judgment for the Board's on that point, and seek to justify by declaring that the Government's interest would better be served if the Board had required Vineland *to destroy its airplane except for basic material content, whether its sale is within three years from date of purchase or thirty years*. If Vineland's legitimate needs had been fulfilled, it would appear that, considering the avowed objects of the Act above, the contrary was true.

The Government says that Congress did not intend all 20 of the Act's objectives to apply to each disposal (G. 26). Nor did the trial court so hold. It held merely that insofar as portions of Section 8304.11(b) of Regulation 4 contravened certain of the objectives, it was invalid. By providing that "In formulating such regulations, the Board shall be guided by the objectives of this Act," Section 9 of the Act required this result. The Government failed to show in the trial court, nor do we believe it has shown in this court, that Form 65 complies with other objectives so as to justify a different result.

The Government then argues (G. 26-27) that since the original disposal furthered the objectives of the Act, "how can it be said that a continuing restriction on the use of the property for educational purposes, including purposes of research and experiment, violates" them? Simply because under the Act the disposal is *independent* of any continuing restrictions. The original disposal and the continuing restrictions are two different things, not to be confused. A repugnant restriction does not become good merely because agency officials seek to attach it to a good disposal. It is the continuing restriction, not the original disposal, which violates the objectives of the Act, for reasons already stated.

The Government further argues that the effect of the trial court's holding is to make the restrictions valid should a school sell to nonveterans, and invalid where it sells to veterans such as the Finns. Not so. As appears from the opinion [R. 135-136] the trial court did not depend alone upon objective 2(f) of the Act, but regarded the objectives as a whole. Moreover, it cannot be denied that Section 2(f) *does* establish a policy in favor of returning veterans, well within the prerogative of Congress. One within that classification may justly complain if that policy is disregarded, while one not within the classification may not.

In its footnote 18 (G. 27) the Government says that by its contract with the Finns, Vineland was to receive a \$21,000 consideration for a plane for which it paid only \$200. We have already shown by testimony of one of the Government's own witnesses where at least \$15,000 of this increase in value was due to stimulus of the Korean War [R. 301]. Accordingly, this is no grist for appellant's mill. The same footnote goes on to say that the Finns were to receive \$5,000 per month from International on an 18 months lease, or a total of \$90,000. This is an unfair statement, since it omits entirely a consideration of the investment in licensing the plane, testified to as approximately \$45,000 to \$46,500 [R. 957-958], as well as taxes, depreciation and the hazards inherent in the operation of the plane.

The Government next contends that the legislative history "demonstrates that Congress intended such restrictions" (G. 27-28). Its "demonstration" consists of the following:

(a) An extract from House Report No. 1890, 78th Congress, 2d session, page 25. We have earlier²³ quoted from this same extract to show that the "sale or lease"

²³*Supra*, p. 12.

provisions of Section 13 do *not* show an intent to require restrictions such as are contained in WAA Form 65.

(b) Later statutory enactments which recognize restrictions. It may be noted that the powers of the Federal Security Administrator under Section 203(k)(2)(A), 40 U. S. C. 484(k)(2)(A) quoted by the Government (G. 28) are

“ . . . (i) to determine and enforce compliance with the terms, conditions, reservations, and restrictions contained in *any instrument by which such transfer was made.*”

The sections following likewise refer to restrictions in the “instrument by which such transfer was made” or to “such instrument.” This, then, does not include WAA Form 65 restrictions, for we have already shown that Form 65 was not a transfer document.²⁴ Likewise with Public Law 61, 84th Congress, 1st session (H. Rep. 3322). The Government must first establish that said Act applies to the WAA Form 65 restrictions before it can derive any solace therefrom. Admittedly, it would apply only to *valid* restrictions and the validity of the three-year resale restriction in Section 8304.11(b)(3) is not challenged.

We submit that the Government's many arguments in defense of Form 65 have failed; that the restrictions therein are contrary to the provisions and objectives of the Act, and invalid.

3. THERE IS NO ESTOPPEL TO ASSERT THE INVALIDITY OF THE RESTRICTIONS.

The Government assumes several facts in urging its claim to the contrary (G. 47-50). None of these assumed facts were raised by the pleadings, or found as facts by the court. Clearly, then, the question of es-

²⁴*Supra*, p. 17.

toppel or waiver, neither presented to nor considered by the lower court, will not be considered by this appeal. *City of Los Angeles v. Borax Consolidated Ltd.*, 74 F. 2d 901 (9 Cir., 1935); *Aff'd* 296 U. S. 10, 80 L. Ed. 9, 56 S. Ct. 23 (1935); *Zeligson v. Hartman-Blair, Inc.*, 135 F. 2d 874 (10 Cir., 1943); *Bowles v. Capitol Packing Co.*, 143 F. 2d 87 (10 Cir., 1944); *Home Ins. Co. v. Ciconett*, 179 F. 2d 892 (6 Cir., 1950).

Moreover, there is no evidence that Vineland "acquiesced in [any] administrative interpretation for more than four years" (G. 48) or that it even knew of any such interpretations for more than four years.

The Government goes on to assert that (G. 48) "Since the Finns were not bona fide purchasers, their rights are no greater than Vineland's, and they are also barred by Vineland's acceptance of the plane without protest as to the conditions and by Vineland's long period of acquiescence." We believe the Government has failed to show any bar *on the facts*, as against Vineland. If there was, it would certainly not affect International, as to which the trial court has expressly found that it acted in good faith [R. 152].

Nor is Vineland claiming both "under and against the same deed" (G. 49) when it attacks Form 65. We have already seen that Form 65 is not a deed; it is not a transfer document of any kind. It is an *application* for surplus property, in the form of which the applicant "certifies and agrees" to certain matters. No signature by a federal Government agent even appears thereon. The rule for which the Government contends, then, is entirely inapplicable.

Nor is it true that just because certain of the restrictions of Form 65 are invalid, this compels "the logical result . . . that the transfer was void, and neither Vineland nor the Finns ever acquired any interest in the plane," as urged by the Government (G. 49). The

position of Vineland and the Finns, as well as that of International, is expressly protected by the Act. Section 25 provides:

“A deed, bill of sale, lease, or other instrument executed by or on behalf of any Government agency purporting to transfer title or any other interest in property under this Act shall be conclusive evidence of compliance with the provisions of this Act insofar as title or other interest of any bona fide purchasers for value, or lessees, as the case may be, is concerned.”

In *United States v. Jones* (CCA 9), 175 F. 2d 278, this court stated:

“ . . . because the various agencies of the Government, in carrying on the war, could not, in their acquisition of property, be guided by ordinary peacetime considerations of economy or thrift, *Cf. United States v. Bethlehem Steel Corp.*, 1942, 315 U. S. 289, 305-309, 62 S. Ct. 581, 86 L. Ed. 855, but, of necessity, had to anticipate unforeseen events—the property of which they found themselves possessed at the time, was of unusual quantity and value. In seeking to dispose of it promptly, the Government sought to be fair with those who bought and gave them the guaranty that, once the negotiations for disposition of any of the property have been transmuted into a formal deed, lease or other instrument in writing, it was conclusive evidence of compliance with the provisions of the statute and of title. And they provided that the purchaser for value or lessee, not, as is usually done in statutes of this character—innocent third parties, into whose hands property may go, but *the very parties with whom the agencies dealt and to whom the instruments were made out*, should be protected if they paid value. No other condition was attached.”

Again, the Government implies that the disposal agency may not have transferred this plane to Vineland without Form 65, so to invalidate it now would usurp administrative authority. To uphold such a theory would in effect give the agency *carte blanche* to write its own ticket. As observed by the trial judge, "a valid administrative regulation binds the administrator himself equally with others (citing cases)." [R. 134].

We submit that this is a complete answer to the Government's said claim. There is no legal or factual basis for an estoppel as against Vineland or the Finns, and certainly none as against International.

4. THE RESTRICTIONS ARE MERELY CONTRACTUAL IN EFFECT, GIVING RISE TO AN ACTION FOR DAMAGES, IF ANY, FOR THEIR BREACH.

We believe that we have shown that title passed by the Vineland transaction, and cumulatively, that the Form 65 unlimited restriction is invalid. Assuming but not conceding the contrary, what is the remedy for its breach, if any, by Vineland? An answer to this question requires analysis of the positions of each appellee.

As the warrantor, Vineland is the only party who could be held for breach of the scrap warranty, and the remedy would only be in damages.

Thus in *United States v. Newbury Mfg. Co.*, 36 Fed. Supp. 602 (D. Mass. Jan. 16, 1941) defendant bought merchandise from the Government by agreement which provided:

"The purchaser agrees to dispose of the property covered by this contract for export to foreign countries only, and that it shall not be offered for sale for use in, nor be permitted to reach the local markets within the continental limits of the United States"

The Government instituted several suits upon a trust theory against shareholders who received salaries and dividends out of profits from sales in violation of the agreement. Those defendants moved to dismiss, held, granted. The sale passed full title. Even a partial failure of consideration does not give rise to a constructive trust. A breach of contract, however deliberate, does not become a tortious wrong. Nor is the corporate defendant liable for profits upon any trust theory.

Full discussion is not attempted herein as to possible measure of damages since we do not believe International is connected with any such phase of the case. However, if California Civil Code, Section 1789(6) applies, the measure would be the Government's "loss directly and naturally resulting in the ordinary course of events from the breach of warranty." The Government's loss from Vineland's failure to reduce the airplane to its basic material content where no right to the proceeds is reserved, would appear to be only nominal.

In its effort to recover the plane the Government suggests that WAA Form 65 gave rise to a bailment, a trust, or a determinable fee (G. 42). On their face these legal concepts are incompatible, each with the others. Therefore, it is apparent that by the suggestion of all three the Government recognizes the insecurity of its position with respect to each.

The transaction was not a bailment. As seen, Section 13(a)(1)(A) of the Act authorized a *sale or lease*. The word "bailment" is nowhere to be seen. Yet a bailment as such is not an uncommon form, it having been used many times by the Government in lending tools and machinery to contractors to perform Government contracts. Only it was not contemplated by the Surplus Property Act, else it would be named therein.

The Government claims the leasing permitted by the Act authorizes bailments. First of all, this overlooks

Section 8304.7 of Regulation 4 which, as we have seen, requires that after June 30, 1946, transport aircraft shall be disposed of only by sale. Secondly, the word "lease" as applied to personal property does not generally refer to the relationship of bailor and bailee. This depends entirely on the nature of the transaction and the intention of the parties. See 8 C. J. S., Bailments, p. 226. Furthermore, it is of the very essence of a contract of bailment that it shall contemplate the return of the property bailed. See 8 C. J. S., Bailments, pp. 225, 303; Black's Law Dictionary, p. 184 (3d Ed.); 2 Kent, Comm. 559; *Zetterstrom v. Thomas*, 92 Conn. 702, 104 Atl. 237, 1 A. L. R. 392; *Samples v. Geary*, 292 S. W. 1066, 1067; *Tashima v. People*, 48 Colo. 98, 144 Pac. 200, 201. Even the case of *Commissioner v. San Carlos Mining Co.*, 63 F. 2d 153, cited by the Government (G. 43) so holds. There is nothing contained in WAA Form 65 or in War Assets Regulation No. 4 which provides for the return of the surplus aircraft to the Government, even after it might no longer be suitable for use for educational purposes. Although Vineland could, of course, offer the aircraft back to the Government, it was not required to do so by the terms of the WAA Form 65.

Viewing the transaction in the context of the law and the sales receipt [International's Ex. "A"] which War Assets Administration gave Vineland, we submit that there was no bailment.

Nor was the transaction a trust. A trust relationship was not contemplated in any disposition of surplus property under the Act, Regulation 4, WAA Form 65, Vineland's purchase order on a War Assets Administration-supplied form [Vineland's Ex. "D"], or the sales receipt [International's Ex. "A"]. The sales receipt appears as the transfer document, and it is unqualified as a sale. Authority to sell, even to sell or lease, does not imply authority to establish a trust. The Government's citations in

connection with this argument (G. 44-45) are not in point. Bogert, *Trusts and Trustees*, Vol. 2A, Sec. 361 (1953 ed.), while referring to the public policy favoring trusts for educational purposes, nowhere suggests that this would be sufficient to raise such a trust where none was originally *intended*. In *United States v. Michigan*, 190 U. S. 379, the Government granted certain land to the State of Michigan for canal purposes, "and for no other." This was held to be a trust, but note that the intention to create a trust was clearly expressed by the act of Congress granting the land. The Government's remaining cases cited here are likewise distinguishable.

Nor can the transaction fairly be considered a determinable fee. Here, in effect, the Government is contending for an equitable servitude on personal property, which is contrary to established law. If the "scrap warranty" clause of Government's Exhibit 1 is subordinate to the "agreement" required by Regulation 4, then no problem arises: there were no restrictions when Vineland sold the airplane. If not so subordinate, the "scrap warranty" clause nevertheless is an *agreement*, nothing more, for equitable servitudes on personal property are not recognized in the United States.

Thus, *In re Consolidated Factors Corp.* (1931) D. C. S. D. N. Y., 46 F. 2d 561, 562, involved a petition to reclaim certain stock certificates alleged to have been transferred in violation of an agreement not to do so. The court states (p. 562):

"Inasmuch as the exchange . . . [of the stock] was a transfer of title . . . the fact that the memorandum of sale . . . contained mutual restrictive covenants is immaterial in my opinion so far as third parties are concerned.

"I hold not only that Greenstein's knowledge of that negative covenant did not bind the Consolidated

Factors Corporation because he was president of that Corporation, but I go still further and hold that, assuming that the Consolidated Factors Corporation did have notice of Greenstein's restrictive covenant as to the sale of the Hartman Tobacco Company stock, that fact would not make it a trustee in equity of the stock for the Hartman Tobacco Syndicate or for the reclaimant . . .

"As a general rule a restrictive covenant on a chattel or other personal property does not follow it into the hands of third persons whether such persons have notice of the covenant or not."

Again, in *National Skee-Ball Co., Inc. v. Seyfried* (1932), 110 N. E. Eq. 18, 158 Atl. 736, 737, there was an action to prevent the use of Skee-Ball equipment except as specified in certain licensing agreements. In finding for the defendant, the court said (p. 736):

"The real question involved is whether a restrictive covenant may attach to personal property and bind successive purchasers with knowledge thereof."

In answering in the negative, the court said (p. 737):

"While an agreement between the seller and the purchaser of personalty limiting its use to a certain locality may be valid as between the immediate parties, I am not ready to hold that such a covenant runs with the property. The trend of judicial action is opposed to limitations and restrictions of the alienability of personal property."

In *Grogan v. Chaffee* (1909), 156 Cal. 611, 105 Pac. 745, the California court held that the seller of olive oil under a price maintenance contract could enjoin his immediate purchaser from selling the oil for less than the price fixed; however, the court stated that the question of whether the contract could be enforced against persons who might come into possession of the plain-

tiff's oil with notice of the restriction imposed by him on its sale but without having made any direct agreement to respect such restriction was not presented.

In *D. Ghiradelli Co. v. Hunsicker* (1912), 164 Cal. 355, 128 Pac. 1041, the California court again refused to discuss the question of equitable servitudes, holding that the defendant was bound under a contract entered into with a wholesaler of chocolate who, in turn, entered into a contract with the manufacturer of the chocolate, stating (p. 359):

"Under these circumstances we are not called upon to consider the question suggested, but not decided in *Grogan v. Chaffee*, 156 Cal. 611 (27 L. R. A. (N. S.) 395, 105 Pac. 745), whether such a contract between the manufacturer and his immediate vendee could be enforced against persons who might come into possession of plaintiff's product with notice of the restriction imposed by him on its sale, but without having any direct agreement to respect such restriction. . . . It may be assumed as said in *Park & Sons Co. v. Hartman*, 153 Fed. 39 (12 L. R. A. (N. S.) 135, 82 C. C. A. 173), that 'the restrictions imposed by complainant upon sales and resales, if valid at all are only so because they constitute personal contracts upon which an action will lie only against the contracting party'."

Both the *Grogan* and *Ghiradelli* cases cite the leading case of *Garst v. Hall & Lyon Co.* (1901), 179 Mass. 589, 61 N. E. 219, which case was an action against a retail drug corporation for selling the plaintiff's proprietary product for less than the contract price. In finding for the defendant, the court said (p. 219):

"The purchaser from a purchaser has an absolute right to dispose of the property. He may consume it, or sell it to another. The plaintiff has

contracts from his vendees in regard to the prices at which they will sell if they sell at all. If they sell in violation of their contracts with the plaintiff, he has a remedy against them to recover his damages . . . This right is founded on the personal contract alone, and it can be enforced only against the contracting party. To say that this contract is attached to the property, and follows it through successive sales which severally pass title, is a very different proposition. We know of no authority, nor of any sound principle, which will justify us in so holding."

The case of *Northern Pacific Ry. v. Townsend*, 190 U. S. 267, relied upon by the Government (G. 45) is clearly distinguishable from the situation in the instant case since (1) it involved real property, and (2) the act of Congress granting the land expressly recited its own limitation.

Likewise, as to the Government's citation of *Hale v. Finch*, 104 U. S. 261; *Boal v. Metropolitan Museum of Art* (C. C. A. 2), 298 Fed. 894; and *National Metropolitan Bank v. United States*, 111 Fed. Supp. (Ct. Cls.), 422, they are not in point here. In the *Hale* case a steamboat was sold upon an *express condition written into the transfer document* that the boat would not be used upon certain waters for a *limited* period of time. The court indicated that for a breach of this condition, the seller might reclaim the boat. In the instant case, however, there was no such express condition written into the Government's transfer document, *i. e.*, the sales receipt [International's Ex. "A"]. Nor on the Government's own theory are the Form 65 restrictions at all limited in time. It contends for the contrary.

The *Boal* case, *supra*, dealt with a testamentary trust of personalty which limited alternative remainders. This is not our case. The *National Metropolitan Bank* case,

supra, involved a transfer containing in the *transfer document* express words of reverter. The instant case contains no such words.

The trial judge succinctly discussed the problem as follows [R. 129-130]:

“ . . . Form 65 contains no reservation of power in the Government to revest title to the property, nor any provision that title will automatically revest on violation of the restrictions. Moreover restrictions upon title which restrain alienation and use are not favored by the law.²⁵ See: *Davis v. Gray*, 16 Wall. (83 U. S.), 203, 230 (1872); *Los Angeles University v. Ewarth*, 107 Fed. 798, 803 (9th Cir. 1901).] So where, as here, there are ‘no express terms creating a condition, no clause of re-entry nor words of any sort indicating such purpose, the conclusion is unavoidable that the obligation in question is a covenant * * *’ [*Columbia Railway, etc., Co. v. South Carolina*, 261 U. S. 236, 248, 250 (1923)] for the breach of which damages would be the only remedy. [See: *United States v. Michigan*, 190 U. S. 379 (1903); *Northern Pacific Railway v. Townsend*, 190 U. S. 267 (1903); *Emigrant Co. v. County of Adams*, 100 U. S. 61, 71 (1870).]”

Finally, the Government argues that “ ‘any ambiguity in a grant is to be resolved favorably to a sovereign grantor’ ” (citing cases) (G. 40). We do not dispute this is an abstract proposition of law. But it does not apply here. The Government points out nothing, no

²⁵In its footnote 29 (G. 40) the Government states that “it should be noted that *considerations of public policy* which, as the district court noted [R. 130] have caused courts to strike down or avoid unreasonable restraints on alienation have no bearing on transfers authorized by congress.” In fairness to the district court, it said no such thing, as reference thereto shows.

word, phrase or sentence which it claims is capable of a double construction, so to request that it be construed in its favor. Certainly, an ambiguity will not be implied in order to reach that result artificially.

II.

Vineland's Disposal of the Plane in 1951 Passed Full Title to the Finns.

A. The Documents Show a Plain Intent to Transfer Title.

On February 28, 1951, Vineland and the Finns entered into a written contract for the sale of the aircraft in suit [Vineland's Ex. "B"]. We quote from portions of this contract:

"I.

"The District hereby transfers all of its right, title and interest in and to that certain C-46 Aircraft #23645 to the Contractors, effective immediately upon the execution of this agreement. Concurrently with the execution of this agreement the District agrees to execute a Bill of Sale and/or transfer of title to the said aircraft to the Contractors.

"II.

"The Contractors hereby agree, and do hereby accept the possession and title of said C-46 Aircraft #23645, as evidenced by this agreement, and the aforesaid Bill of Sale and/or transfer of title; provided, however, the Contractors agree that irregardless of the transfer of possession and title of said C-46 Aircraft #23645, the sole use of said aircraft shall be and the same is reserved to the District for educational purposes only, until such time as all of the terms and conditions set forth in this agreement are fully performed by Contractors in a reasonable and competent manner; . . .

“III.

“For and in consideration of the transfer of all of its right, title and interest in and to the afore-described C-46 Aircraft #23645 by the District to the Contractors, the Contractors expressly AGREE as follows:”

Clearly, this language shows a plain intent to transfer immediate title. As indicating its further intent so to do, on April 14, 1951, Vineland made, executed and delivered to the Finns a Civil Aeronautics Administration form bill of sale, whereby Vineland as Seller did “hereby sell, grant, transfer, and deliver all of [its] right, title and interest in and to such aircraft unto” the Finns, who were named therein as purchaser [International’s Ex. “A,” App. “C”]. This document was backdated to February 28, 1951, because, as Superintendent Bancroft testified, “We just didn’t take the time to sign the bill at the time of agreement and accepted by the Board” [R. 565].

In seeking to backtrack upon the effect of these acts Vineland in its opening brief²⁶ (V. 8) contends that its said contract of February 28, 1951, was subject to a condition precedent. The provision referred to, paragraph IV of the contract, provides that:

“ . . . this agreement is contingent upon Contractors’ ability to secure the necessary clearances from the Government of the United States of America on restrictions now existing on the use and possession of the afore-described C-46 Aircraft #23645, by virtue of the Deed of Conveyance of said aircraft from the said Government of the United States to the District, and by virtue of related Federal laws on the use thereof.”

²⁶Page references to Vineland’s brief are designated “(V.)”

The italicized portion of the quoted provision was not set forth by Vineland (V. 8). We believe that it is of importance here.

In the first place there were no restrictions "by virtue of the deed of conveyance," which was the War Assets Administration sales receipt of July 10, 1946 [International's Ex. "A"]. The further specification of restrictions, "by virtue of related Federal laws," shows that the words "by virtue of" are intended to mean "in"²⁷; otherwise, no reason for the specification exists: the the clause would be superfluous, which is not to be presumed. We have already seen that no restrictions in "related Federal laws," meaning the Act and its Regulation 4, oppose Vineland's transfer to the Finns.

However, even if Vineland's Exhibit "B" intended to refer to the Form 65 restrictions by some vague form of incorporation by reference, they would not operate to prevent Vineland's sale if those restrictions were invalid, as we believe we have shown them to be. If the unlimited restriction of Form 65 is valid but merely contractual in effect giving rise to damages for its breach, paragraph IV would still not prevent Vineland's sale, for it is clearly a *condition subsequent* thereto.

"A condition subsequent in a contract is one which follows liability upon the contract and operates to defeat or annul such liability upon the subsequent failure of either party to comply with the condition." (12 Am. Jur., Contracts, Sec. 850.)

Title having already passed by paragraphs I and II of Vineland's said Exhibit "B," the further condition followed a *fait accompli*, and therefore related to rights subsequent thereto. The intention of the parties so to regard paragraph IV is reinforced by Vineland's delivery

²⁷The Notice for Bids [Vineland's Ex. A] uses the word "under" in the same sense.

to the Finns of a bill of sale to the plane on April 14, 1951, *backdated* to February 28, 1951.

Vineland next contends that only a condition precedent would be "legal and proper," since the contract must contain the same provisions as appeared in the notice for bids (V. 9). Elaborate as it is, Vineland's reasoning here is predicated upon a false assumption. The notice for bids did not specify the "release" as a *condition precedent to passing title*, only that releases must be secured. The contract, Vineland's Exhibit "B," conforms thereto.

In its own attempt to invalidate the Vineland-Finn transfer and thereby shed its liability on the counterclaim, the Government makes a similar statement which should be compared with the record. It says (G. 70), "the Notice indicated that there would be no transfer of the plane until Government clearance had been obtained . . ." *We deny that the Notice says any such thing.*

The Government next claims (G. 70) variance between the Notice [Vineland's Ex. "A"] and the contract [Vineland's Ex. "B"], saying "In addition, the Notice indicated that no sale would be made at any time unless the requisite clearances were obtained, but the contract indicated that the Finns could eventually obtain the plane for salvage use even though clearance was not obtained." It may be noted that the first part of this sentence assumes the same fact challenged above.²⁸ The second part likewise is not supported by the record. For Vineland's contract Exhibit "B" (Par. IV(4)) provides

²⁸The pertinent provision provides: "Bidders are expressly notified that the aforesaid aircraft was acquired by the district from the Government of the United States and the War Assets Administration, subject to certain restrictions on the use thereof *under the deed of conveyance*, and the successful bidder will be required to secure the necessary releases to said restrictions from the proper governmental agency of the United States of America." [Vineland's Ex. A.]

that without releases, the Finns shall be entitled to delivery of the plane for salvage "*provided, satisfactory assurance is given to the District that existing Governmental restrictions will not be violated by the Contractors, or by any other person, firm or corporation, with or without the consent of the Contractors . . .*"

With said proviso quite a different picture appears, one which is quite consistent with the Notice. The law does not require an idle act. If no restrictions existed, it is not to be presumed that Vineland's Notice required releases from no restrictions. Even arguing that the Notice did nevertheless so require, the assurance required by Vineland's contract proviso is a substantial equivalent thereto. Such assurance could not be *satisfactory* unless it served the same purpose as the releases.

We note in passing that this point was raised by the Government, not by Vineland so as to entitle Vineland to rely thereon. In any event, we believe we have shown that it is without merit.

Vineland next argues that it could not properly pass title without first receiving performance, otherwise would be to *lend the credit* of the District, contrary to the California Constitution, Article IV, Section 31; and that if this was intended, "it must be determined that the agreement was illegal and void." (V. 10). Vineland's brief does not set forth the direct constitutional prohibition relied upon, either verbatim or by summary; nor does Vineland cite this court to any case which it claims has applied such prohibition to a situation like the one present here. We believe that the prohibition does not apply to the facts at bar. The provision appears to be aimed at prohibiting the State or its political subdivisions from borrowing or otherwise involving themselves upon their credit. In our case, Vineland was not a borrower, it was a seller. Vineland borrowed nothing; it simply sold a plane to the Finns. The sale was on

the Finns' credit, not Vineland's. Indeed, the Finns were required by said contract to post a faithful performance bond in the sum of \$2,100 with Vineland [Par. III(5) of Vineland's Ex. "B"], so it is evident that with respect to the balance of the consideration, the Finns' credit was relied upon. Vineland's credit is nowhere involved. This Conclusion receives additional weight when viewed in light of the fact that the Kern County Counsel drew up the contract, Vineland's Exhibit "B," and approved the legal aspects thereof [R. 258].

Vineland next contends for an ambiguity in said contract, respecting the time title was to pass (V. 11). We deny that any ambiguity exists. It is the intent of the school board, not Superintendent Bancroft (who was its agent but not a member) which is relevant; hence its references to testimony by Mr. Bancroft are irrelevant. As to Board Member Johnson's testimony, it nowhere refutes the intent manifested by Vineland's contract and bill of sale to the plane. By the parol evidence rule it could not.²⁹

Vineland lists (V. 11) other factors which it says established the ambiguity as to when title passed. A discussion of each is unnecessary because, at most, they pose only a question for the determination of the trial court. And here, by an express finding, the trial court has found that "on February 28, 1951, [Vineland] did sell and did transfer constructive possession of said air-

²⁹When Vineland attempted to show Board Member Johnson's contrary intention an objection thereto was interposed by the Government [R. 590], and sustained by the court [R. 593], the court observing: "I don't think it is competent for the seller to get on the stand and say, 'I didn't think I was doing that'; any more than he could get on when he signs the promissory note, he can't be heard to get on the stand and say, 'I didn't really think I was obligating myself to pay. I didn't intend that.' What he objectively manifested, that is what we are to judge his intention by.

"The objection will be sustained."

craft to Defendant Charles C. Finn and Defendant George C. Finn" [R. 150]. As a conclusion of law the trial court held to the same effect [R. 156].

Vineland asks this court to regard, instead of the foregoing, the special verdict of the advisory jury in answer to Interrogatory No. 2, that it did not intend to transfer title before "all necessary consents and releases and waivers" had been procured (V. 11). It is true that the trial court adopted the jury's findings as its own [R. 156]. But under the trial court's ruling, there were no consents, releases or waivers to be obtained. If this court rules differently, still Vineland is faced with a specific finding that on February 28, 1951, Vineland "did sell" the plane. If a general finding is inconsistent with a specific finding, the latter controls (53 Am. Jur., Trial, Sec. 1141; cases collected in 23 McKinney's Dig. 882). Accordingly, the specific finding here [Finding No. 3, R. 150] must control the general finding [Finding No. 21, R. 156] incorporating the findings of the advisory jury.

But "the conditions of the subject agreement and related documents have not been performed," Vineland complains (V. 12-13). Admittedly, Vineland did receive part performance [R. 473]. If the Finns' obligations were conditions subsequent, as we believe we have shown they were, that Vineland did not receive the balance matters not. The judgment of the trial court was expressly made without prejudice to such claims by Vineland against the Finns [R. 158]. Further, it is to be noted there was no finding made that the Finns were in default under Vineland's Exhibit "B." Indeed, the fact seems to be to the contrary.⁸⁰

⁸⁰Superintendent Bancroft's testimony on this point was that no notice of default or similar document had ever been served on the Finns, and "we never saw any evidence that they would not perform" their contract. [R. 543.]

In its Point II Vineland urges (V. 14) that the District Court erred in failing to rule that Vineland's Exhibit "B" and related documents was a conditional sales contract. We have no quarrel with the law Vineland cites relating to title-retained contracts. It is good law. But it does not apply here, simply because Vineland did not retain title, it delivered it to the Finns. It delivered it with its contract Exhibit "B," and confirmed its intention some six weeks later with its bill of sale to the plane, International's Exhibit "A." Vineland's factual argument that this transaction constituted a conditional sales contract is substantially a duplication of its factual argument that the contract Vineland's Exhibit "B" constituted a contract with conditions precedent to the passage of title. Duplicating our answer thereto would serve no useful purpose, nor do we believe that this court requires citations to illustrate the difference between Vineland's Exhibit "B" (and subsequent bill of sale) and a conditional sales contract.

B. Vineland's Transfer Was Authorized by Law.

California Education Code, Section 18701, provides the authority for Vineland to make the transfer in question.³¹ In its brief, Vineland makes no contention that the sale to the Finns violated this section; indeed, as we have seen, Vineland's counsel, the Kern County Counsel, approved the transaction as to its legal aspects when it was entered into [R. 258].

But the Government *does* challenge the sale on this ground, as a possible solution to its liability on the counterclaim (G. 69). Both its contention and the answer thereto may best be stated in the words of the trial judge, as follows [R. 131]:

"It is urged nonetheless that the sale to defendants Finn is void because the consideration included

³¹Set forth at G. 69.

labor and materials as well as cash. The applicable California statute provides in part that the 'board of any school district may sell * * * for cash * * *' [Cal. Ed. Code Sec. 19801.] This statute is permissive only; the auxiliary verb 'may' does not limit the authority conferred to cash sales. It follows that at least as early as February 28, 1951, defendant School District passed valid title to defendants Finn."

Nothing in *Miller v. McKinnon*, 20 Cal. 2d 83, 124 P. 2d 34, compels a different result. In that case the Board of Supervisors of Santa Clara County authorized McKinnon, a member thereof, to have certain work done to a county quarry. Part of the work was done and paid for. A taxpayer sued to recover it, alleging that no bids for the work were called for. The court held merely that such a complaint stated a cause of action since compliance with the terms of a statute requiring competitive bidding and advertising by bids is mandatory. In the instant case there was both advertising and bidding [R. 516].³² Therefore, the cited case proves nothing in so far as the instant case is concerned. The same is true in respect of *Los Angeles Dredging Co. v. Long Beach*, 210 Cal. 348, 291 Pac. 839; *Reams v. Cooley*, 171 Cal. 150, 152 Pac. 293, and *Zottman v. San Francisco*, 20 Cal. 96. All relate to failure to comply with *bidding* requirements, and all are cited in *Miller v. McKinnon*, *supra*, as authority for the decision in that case. None are even remotely analogous to the facts at hand.

Moreover, it should be noted that Vineland's contract Exhibit "B" *does* provide for the Finns to pay Vineland a cash consideration of \$5,000 (Par. III(2)). It would be strange indeed if a contract providing for a cash con-

³²Noteworthy are the recitals to that effect in Vineland's contract, Exhibit "B".

sideration of \$5,000 and otherwise valid should become invalid because it requires other considerations as well. Particularly is this so where as here the Finns were the only bidders [R. 150].

Likewise, it would be strange if the Government could successfully raise this point where Vineland in its own appeal has chosen not to do so. The Government is not in the standing of a taxpayer as in *Miller v. McKinnon*, *supra*, nor has it shown, as was deemed essential in that case, that it has first demanded that corrective action be brought by designated county authorities, and they have failed to do so.

We submit that Vineland's transfer of the plane to the Finns was authorized by law; and that deviation, if any, therefrom was minor, insubstantial, and not within the capacity of the Government as complaining party to complain of.

III.

As a Bona Fide Purchaser (Encumbrancer, Accessor), International Is Entitled to Prior Rights in the Plane.

A. International Is a Bona Fide Purchaser (Encumbrancer, Accessor).

1. *Under the Act.* Under Section 25³³ of the Surplus Property Act, not only International, but also Vineland and the Finns are to be considered bona fide purchasers³⁴ from the Government. This is the effect of the holding of this court in *United States v. Jones* (CCA 9), 175 F. 2d 278.

³³Set forth *supra*, p. 40.

We note that the Government has failed to include Section 25 in its Appendix B (G. 81-84).

³⁴As used herein the term "purchaser" includes "encumbrancers" and "accessors".

In Jones' brief on appeal it is stated (pp. 29-30):

"It is to be noted that Section 25 used the term 'bona fide purchaser for value.' Congress did not use the term bona fide purchaser for value *without notice*, as now commonly used under the Uniform Sales Act (Calif. Civil Code Section 1744) but omitted the requirement concerning absence of notice. The fact that the factor of 'value' was specifically mentioned in addition to the requirement 'bona fide' makes even clearer the intent to omit any requirement as to 'notice.' "

Thus it is clear that International was a bona fide purchaser under the Surplus Property Act, prior in right to the United States seeking to reclaim surplus property of which it has disposed.

2. *Apart from the Act.* The trial court made findings of fact as follows:

"8. Said aircraft required substantial repairs before it could be considered airworthy. On August 31, 1951 [the Finns] as mortgagor executed a chattel mortgage on said aircraft to [International], as security for a loan of \$15,000³⁵"

"9. * * * Said aircraft remained in . . . International's possession until May 25, 1952, during which time . . . International bestowed labor and materials for its repair and improvement, of the reasonable value of \$10,200 for which . . . International claimed an aircraft lien under the provisions of California Code of Civil Procedure Section 1208.61 *et seq.* * * *

"10. *Said loan was made and said labor and materials were bestowed by Defendant International in*

³⁵International's cancelled check for \$15,000 is in evidence as its Exhibit F.

the ordinary course of its business believing in good faith that Defendants Finn were the true and lawful owners of the aircraft."

It is true that in its special verdict the advisory jury found that International had "either knowledge or notice" of (1) "interests and claims of . . . Vineland", and (2) that the Government "claimed restrictions upon the use or sale of the airplane in suit" when International advanced the money and did the work on the plane [R. 115]. However, the special verdict, including the foregoing, *was carried into the trial court's findings of fact by a general finding only* [Finding 21, R. 156]. The trial court's finding of International's good faith, notwithstanding such knowledge or notice, was a *specific* finding. The rule is well settled that if a general finding is inconsistent with a specific finding, the latter controls.³⁶ (53 Am. Jur., Trial, Sec. 1141; cases collected in 23 McKinney's Dig. 882). Accordingly, the specific finding of International's good faith [Finding No. 10, R. 152] must control the general finding incorporating the findings of the advisory jury [Finding No. 21, R. 156].

B. As Against International, the Government Is Estopped to Deny That It Passed Title to Vineland.

The principles of estoppel are familiar in equity, whether by deed, or *in pais*. Thus by his deed one is estopped to deny that he granted or that he had good title (*Rhine v. Ellen*, 36 Cal. 362). Estoppel *in pais* or equitable estoppel refers to all estoppels otherwise than by record, deed or contract (10 Cal. Jur. 625). One form of this is permitting apparent title to be in another whereby an

³⁶The advisory jury's said finding as substantially quoted is still far short of knowledge that the Government still claimed title. For obviously, International couldn't know that the Government claimed title if as found by the jury International in good faith believed that the Finns were the true and lawful owners of the airplane.

innocent third party is led into dealing with him to its damage (10 Cal. Jur. 641).

The Government may contend that it cannot be estopped to assert title to the airplane, either by deed or *in pais*. We believe the law is to the contrary where as here the Government initiates suit and asks for equitable relief in the form of a declaratory judgment. That such form of remedy is equitable is well established.

Gordon Johnson Co. v. Hunt (D. C. Ohio 1952),
102 Fed. Supp. 1008;

Crosley Corp. v. Westinghouse, 43 Fed. Supp. 690;
Caven v. Clark (D. C. Ark. 1948), 78 Fed. Supp.
295;

Sellers v. Johnson (D. C. Iowa 1946), 69 Fed.
Supp. 778, reversed on other grounds, 163 F. 2d
877.

Thus in *United States v. Stinson*, 197 U. S. 200, 205:

“It is a good defense to an action to set aside a patent that the title has passed to a bona fide purchaser, for value, without notice. And, generally speaking, equity will not simply consider the question whether the title has been fraudulently obtained from the Government, but will also protect the rights and interests of innocent parties (citations).”

The rule, its reasons, and authorities have been stated in the well-reasoned case of *Daniell v. Sherrill* (Fla. 1950), 48 So. 2d 36, as follows:

“It should be borne in mind that here the State has come into its courts and impleaded its own citizens and asked that title in the State be quieted against the claims and equities of those citizens. The State is the moving party: it invoked the jurisdiction of a court of equity. The Sovereign, in such a situation is bound by the maxim, ‘He who seeks equity must do equity’, to the same extent that any citizen would

be bound. It has been aptly said: 'If we say with Mr. Justice Holmes, "men must turn square corners when they deal with the government", it is hard to see why the Government should not be held to a like standard of rectangular rectitude when dealing with its citizens.' 48 Harvard Law Review, 1299. See the case of *State of Iowa v. Carr*, 8 Cir., 191 F. 257, 266 where the Court said:

" 'But the great weight of authority, the stronger reasons and the settled rule upon this subject in the courts of the United States, is that, while mere delay does not, either by limitation or laches, of itself constitute a bar to suits and claims of a state or of the United States, yet, when a sovereignty submits itself to the jurisdiction of a court of equity and prays its aid, its claims and rights are judicable by *every other principle and rule of equity* applicable to the claims and rights of private parties under similar circumstances.

" 'The equitable claims of a state or of the United States appeal to the conscience of a chancellor with the same, but with no greater or less force than would those of an individual under like circumstances. *United States v. Stinson*, 197 U. S. 200, 204, 205, 25 S. Ct. 426, 49 L. Ed. 724;' (and citing many other cases).

"In the cited case equitable estoppel to assert title to lands was held to bar the State of Iowa.

"In *United States v. Stinson*, 7 Cir., 125 F. 907, 910, affirmed 197 U. S. 200, 25 S. Ct. 426, 49 L. Ed. 724, the doctrine of estoppel was applied to the United States, the Court saying: 'The government may not in conscience ask a court of equity to set on foot an inquiry that, under the circumstances of the case, would be an unfair or inequitable inquiry. The

substantial considerations underlying the doctrine of estoppel apply to government as well as to individuals (citations).”

The *Daniell* case is annotated in 23 A. L. R. 2d 1410, “Estoppel of United States, State, or political subdivision by deed or other instrument.” There (p. 1424) it is stated:

“That sovereignty of the state or the United States alone will not prevent an estoppel by deed receives direct support in other cases in which, although not discussing the effect of sovereignty alone in this regard, the courts have held, upon the merits of the individual cases involved, that the sovereign was estopped by various types of instruments, or the recitals therein.

“*United States.—Fletcher v. Peck* (1810), 6 Cranch 87, 3 L. ed. 162, *infra*, this section; *Lindsey v. Hawes* (1863), 2 Black 554, 17 L. ed. 265, *infra*, Sec. 5; *St. Paul & Pacific R. Co. v. Schurmeir* (1869), 7 Wall 272, 19 L. ed. 74, *infra*, Sec. 5; *Branson v. Wirth* (1873), 17 Wall. 32, 21 L. ed. 566 (dictum), *infra*, Sec. 5; *Cahn v. Barnes* (1881, C. C. Or.), 7 Sawy. 48, 5 F. 326, *infra*, this section.”

In the instant case, the Government has come into its own court to seek a declaratory judgment.

“But when the government seeks its rights at the hands of a court, equity requires that the rights of others as well be protected. *Carr v. United States*, 98 U. S. 438, 25 L. Ed. 209. The Government may not in conscience ask a court of equity to set on foot an inquiry that, under the circumstances of the case, would be an unfair or inequitable inquiry. The substantial considerations underlying the doctrine of estoppel apply to government as well as to individuals (citations)” (*United States v. Stinson*, 125 Fed. 907, 910.)

By its sales receipt of July 10, 1946 [International's Ex. A] the Government transferred title to the airplane. By its Release of Custody of Aircraft dated July 25, 1946 [Government's Ex. 4] the Government transferred possession. Vineland thereby was permitted by the Government to appear as owner for all purposes. When International's interest attached in good faith and for value, the Government in this suit should, like any private litigant seeking equity, be estopped to deny the reasonable effect of its acts.

It is likewise in the issuance by the Administrator of Civil Aeronautics to the Finns of a certificate of registration. It is true under the Civil Aeronautics Act of 1938, as amended (49 U. S. C., Sec. 521) that such certificate is not evidence of ownership in any proceeding where ownership is an issue. But it is undisputed that the CAA went further here. This was a first registration. CAA was aware that the airplane was owned by Vineland, and previously had been purchased under educational disposal provisions of Regulation 4 [R. 400]. Its duty was to receive evidence of ownership before registering the plane to the Finns.³⁷

International relied and was entitled to rely on this registration certificate so issued,³⁸ as a representation that

³⁷The CAA in its official form of application for a registration certificate sets forth an instruction as follows:

"New or Previously Unregistered Aircraft—The applicant for registration of a new or previously unregistered aircraft must submit proof of his ownership." [International's Ex. M.]

³⁸International also relied upon a report by an established aircraft title searcher in Washington who reported that from CAA records title was clear [R. 628; International's Exs. "K," "L"]. International's witness testified this was in the ordinary course of business [R. 629], and one of the Government's expert witnesses, Gordon D. Strube, likewise testified that a check by a title service who goes over to the CAA and checks through the file "is the usual case" [R. 675].

the Government officials who authorized it had obeyed the law; that clearances were unnecessary, or if necessary, they had been duly obtained from the proper agency. CAA knew that Federal Security Administration was the proper agency.³⁹ So relying, International loaned the Finns \$15,000 in cash, and performed \$10,200 worth of work on the airplane.

Since the Government intentionally created a record title in the Finns, and thus led International to believe that it was true, and to act upon it, the case comes squarely within the rule codified in the Code of Civil Procedure, Section 1962:

“The following presumptions, and no others, are deemed conclusive:

“* * * * *

“3. Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it; . . .”

So stated, this is a positive rule of law. No requirement regarding notice or the lack of it is imposed.

Even as a rule of equitable estoppel, ignorance of the fact is not always required. In 19 Am. Jur. 740 “Estoppel”, it is said:

“It is not always true, however, that no estoppel will arise when the party to whom the representation

³⁹At a meeting in Washington with George C. Finn concerning his desire to register the plane with CAA, representatives of both CAA and FSA were present [R. 691]. FSA’s witness, Edward G. Bradley, was aware that the Finns intended to register the aircraft with CAA and intended to fly it [R. 726]. Yet FSA took no steps to prevent the registration [R. 728]. Also, Mr. Bradley testified that he knew of no reason why FSA could not have sent a copy of WAA Form 65 to CAA for insertion into the file of the plane [R. 807].

is made has knowledge as to the truth of all the facts. For example, the owner of a known right or title may by his representations, acts, or silence *so lead another to act in the belief* that the owner has waived, surrendered, or abandoned his right or title that he will be estopped from asserting it to the injury of him who has changed his position in reliance upon the owner's representations, acts, or silence. Likewise, it seems that where property is taken for public uses, it is not necessary, in order to enable the taker to invoke the doctrine of estoppel against the owner, that he shall have been acting in ignorance of the real condition of the title."

Likewise in *Estate of David*, 38 Cal. App. 2d 579, 584, where the court states:

" . . . Though ignorance of the truth is a primary essential on the part of the one pleading an estoppel *in pais*, our courts have recognized another species of estoppel, called '*quasi* estoppel,' which is based upon the principle that one cannot blow both hot and cold, or that one 'with full knowledge of the facts shall not be permitted to act in a manner inconsistent with his former position or conduct to the injury of another.' (10 Cal. Jur., p. 645; *McDanel v. General Ins. Co.*, 1 Cal. App. (2d) 454, 459 (36 Pac. (2d) 829).)"

The Government here is attempting to blow both hot and cold. Its regulations (14 C. F. R. 501.4) require an applicant for registration to submit proof of ownership satisfactory to the Administrator of Civil Aeronautics [R. 723]. Since registration was here issued, we must assume that the submitted proof was in fact satisfactory to that official, who by his agents had actual notice of the Government's claims [R. 692]. Other officials in the Federal Security Administration had actual notice of the Finns' intention to seek and obtain registra-

tion [R. 703, 726]. By force of statute, they had at least constructive notice of the registration itself on April 16, 1951. These included Mr. Baxter, then Chief, Surplus Property Utilization Division, who had authority to waive the restrictions [R. 728]. Yet neither he nor anyone else in Federal Security Administration did anything to record a copy of Government's Exhibit 1 with Civil Aeronautics Administration [R. 728]. This alone may have afforded a *caveat* to the belief disseminated by the Administrator of Civil Aeronautics that he knew of no reason why the Finns' proof of ownership was not satisfactory to him.

Indeed, officials of Federal Security Administration did nothing at all on the matter to bring to International's notice that the Government claimed title to the aircraft until it filed the instant action some fourteen months later, on July 3, 1952. This was after International's interest had attached in reliance upon the record title, which the Government by "blowing hot," both created and failed to deny.

In its position as a suitor seeking equitable relief, the Government is not immune from an equitable estoppel arising from these facts. (See *Smale & Robinson, Inc. v. United States* (D. C., S. D. Cal.), 123 Fed. Supp. 457.) The trial court recognized this by granting leave to International to file its amendment to answer pleading these facts as issues in this lawsuit at the close of trial [R. 107].

C. As Against International, Vineland Is Estopped to Deny That It Passed Title to the Finns.

So also, Vineland is subject both to estoppel by deed, and estoppel *in pais*. Its bill of sale dated February 28, 1951, recites that it is the owner of the "full legal and beneficial title of the aircraft," and "certifies that same is not subject to any mortgage or other encumbrance."

As against International, Vineland now is estopped to deny that its bill of sale passed the title it purported to pass.

Moreover, Vineland is estopped to deny the truth of the recitations in its contract, Vineland's Exhibit "B," which are as follows:

"WHEREAS, the District did heretofore advertise for bids for the sale of a C-46 Aircraft #23645, *in the manner prescribed by law and in the manner prescribed by the applicable provisions of the Education Code of the State of California, and*

"WHEREAS, the Contractors submitted their written bid to purchase said C-46 Aircraft #23645 from the District. *Said bid was in accordance with the aforesaid 'Notice Calling for Bids' and with the specifications adopted by the District and referred to in said notice, a copy of which specifications are attached hereto, marked 'EXHIBIT A,' and made a part hereof as if fully set out at length; and*

"WHEREAS, the bid submitted by the Contractors was the only bid received by the District *and was duly accepted by the District in the manner provided by law, and in the manner provided by applicable provisions of the Education Code;*"

Code of Civil Procedure, Section 1962(2), provides:

"The following presumptions, and no others, are deemed conclusive:

"* * *

"2. The truth of the facts recited, from the recital in a written instrument between the parties thereto, or their successors in interest by a subsequent title; but this rule does not apply to the recital of a consideration;"

This statute makes no exception in favor of school districts.

The facts present also make out an equitable estoppel against Vineland, from which it is not immune. Vineland delivered title of the airplane to the Finns, and clothed them with apparent (if not true) ownership. Vineland then released the plane to the Finns knowing that they intended to license it, and that this would require that additional work be done on it [R. 543]. Upon these acts International relied to its damage. The facts giving rise to estoppel *in pais* are clearly present.

Nor does the law permit Vineland to escape the effect of estoppel merely because it is a political subdivision of the State of California.

In *People v. Gustafson*, 53 Cal. App. 2d 230, 242, the court states:

“A state, as well as an individual, may be estopped where the necessary elements or grounds of estoppel are present (*City of Los Angeles v. Cohn*, 101 Cal. 373 (35 Pac. 1002); 31 C. J. S., Sec. 138, p. 405); it may be estopped when acting in its proprietary capacity as distinguished from its governmental capacity (31 C. J. S., Sec. 140, p. 413); and it may be estopped by the acts of its public officials done in the exercise of powers expressly conferred by law, and by their acts or omissions when acting within the scope of their authority (31 C. J. S., Sec. 142, p. 417).”

In *Brown v. Town of Sebastopol*, 153 Cal. 704, the Town entered into a contract with Brown for some real estate. The contract was defective because it was oral, and the board of trustees' minutes failed to show the Town's acceptance. However, the Town performed certain work required of it and took possession. Brown's

devisees sued to quiet title; held, for the Town. The court states (p. 709):

“ . . . It is well settled that the contract of a municipal corporation, when exercising other than its governmental functions, and within the limits of its charter powers, are construed by the same laws that govern the contracts of private parties. Thus the doctrine of estoppel in such a contract may be invoked on behalf of or against a municipality. Says Bigelow on Estoppel (sec. 1128): ‘But it is a well-settled principle, applicable alike to the states and the United States, that whenever a government descends from the plains of sovereignty and contracts with parties, such government is regarded as a private person itself, and is bound accordingly. A state in its contracts with individuals must be judged and must abide by the same rules which govern individuals in similar cases, *and when such a contract comes before a court the rights and obligations of the contracting parties will be adjudged upon the same principles as if both contracting parties were private persons.*’ (See, also, *Sacramento County v. Southern Pacific Co.*, 127 Cal. 222 (59 Pac. 568, 825); *Contra Costa County v. Breed*, 139 Cal. 432 (73 Pac. 189).) . . . Plaintiffs here seek to hold all the benefits while refusing performance. They are estopped from so doing, under fundamental and well-settled principles.”

In *Farrell v. County of Placer*, 23 Cal. 2d 624, plaintiff failed to file a timely claim for her personal injuries because of certain conduct of county officials. The claim statute is mandatory, and the county contended that its requirement could not be waived or excused by estoppel; held, for plaintiff. The court states (p. 627):

“It has been said generally that a governmental agency may not be estopped by the conduct of its

officers or employees (10 Cal. Jur. 650-651), but there are many instances in which an equitable estoppel in fact will run against the government where justice and right require it. (*City of Los Angeles v. Cohn*, 101 Cal. 373 (35 P. 1002); *Fresno v. Fresno C. & I. Co.*, 98 Cal. 179 (32 P. 943); *Sacramento v. Clunie*, 120 Cal. 29 (52 P. 44); *Brown v. Town of Sebastopol*, 153 Cal. 704 (96 P. 363, 19 L. R. A. N. S. 178); *Times-Mirror Co. v. Superior Court*, 3 Cal. 2d 309 (44 P. 2d 547); *Sutro v. Pettit*, 74 Cal. 332 (16 P. 7, 5 Am. St. Rep. 442); *City of Los Angeles v. County of Los Angeles*, 9 Cal. 2d 624 (72 P. 2d 138, 113 A. L. R. 370); *Contra Costa Water Co. v. Breed*, 139 Cal. 432 (43 P. 189); *County of Los Angeles v. Cline*, 185 Cal. 299 (197 P. 67); *La Societe Francaise v. California Emp. Com.*, 56 Cal. App. 2d 534 (133 P. 2d 47); *McGee v. City of Los Angeles*, 6 Cal. 2d 390 (5 P. 2d 925); *Ernst v. Tiel*, 51 Cal. App. 737 (197 P. 809); *People v. Gustafson*, 53 Cal. App. 2d 230 (127 P. 2d 627); *Hewel v. Hogin*, 3 Cal. App. 248 (84 P. 1002).) *It has been aptly said: 'If we say with Mr. Justice Holmes, "Men must turn square corners when they deal with the Government," it is hard to see why the government should not be held to a like standard of rectangular rectitude when dealing with its citizens.'* (48 Harv. L. Rev. 1299.)"

If these purposeful words have any meaning at all, they require no clarification. We submit that Vineland *can* be, and on the facts here present *are* estopped both in deed and *in pais*.

D. International Has a Valid Recorded Chattel Mortgage.

International's chattel mortgage securing its loan of \$15,000 was recorded by CAA on November 14, 1951 [Finding 8, R. 152]. As seen, the trial court found that the loan was made in *good faith* [Finding 10, R. 152].

Even if this court should regard instead the advisory jury's finding that International had "knowledge or notice" of the Government's claimed restrictions and Vine-land's interests and claims, this cannot defeat International's recorded chattel mortgage. "Actual notice" alone can defeat such rights.

Section 503(c) (52 Stat. 977, 49 U. S. C. 523(a)) provides:

"No conveyance . . . shall be valid . . . against any person other than the person by whom the conveyance or other instrument is made or given . . . or any person having *actual notice* thereof, until such conveyance or other instrument is filed for recordation in the office of the Administrator. For the purposes of this subsection (c), such conveyance or other instrument shall take effect from the time and date of its filing for recordation, and not from the time and date of its execution."

We do not believe that Form 65 is a conveyance. It is by intent an application containing a certification and an agreement imposing personal covenants only. But if the Government's contention to the contrary be accepted, its rights if any must be recorded, or International must be shown to have *actual notice* thereof.

California Civil Code, Section 18, provides:

"Notice is:

"1. Actual—which consists in express information of a fact; or,

"2. Constructive—which is imputed by law."

California Civil Code, Section 19, provides:

"Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact."

The advisory jury's findings that International had "either knowledge or notice" falls short of a positive finding of actual notice. Nowhere in this record appears even a scintilla of evidence that International had *actual notice* of the restrictions,⁴⁰ or of Vineland's claims. These findings to be supported at all must be on the theory of *constructive* notice, which fails to meet the requirement of *actual* notice in Section 503(c) above.

E. Internaitonal Has a Valid Aircraft Lien.

The trial court found that the aircraft in suit "remained in . . . International's possession until May 25, 1952, during which time . . . International bestowed labor and materials for its repair and improvement, of the reasonable value of \$10,200 for which said . . . International claimed an aircraft lien under the provisions of California Code of Civil Procedure, Section 1208.61, *et seq.*"⁴¹ . . . International contends that it has at no time released said claimed lien or consented to possession in the

⁴⁰In his discussions with International's representative Mr. Batchelor, George C. Finn testified he never discussed WAA Form 65 [R. 441]; Mr. Batchelor testified he had never seen a Form 65 or heard of any restrictions or scrap warranty at the time International loaned the \$15,000 [R. 625] or did the work on the plane [R. 633]. There was no other contrary evidence on "actual notice" to International.

⁴¹Sec. 1208.61: "Subject to the limitations set forth in this chapter, every person has a lien dependent upon possession for the compensation to which he is legally entitled for making repairs or performing labor upon, and furnishing supplies or materials for, and for the storage, repair, or safekeeping of, any aircraft, . . ."

Sec. 1208.62: "That portion of such lien in excess of two hundred fifty dollars (\$250) for work or services rendered or performed at the request of any person other than the holder of the legal title is invalid, unless prior to commencing such work or service the person claiming the lien gives actual notice to the legal owner and the mortgagee, if any, of the aircraft, and the written consent of the legal owner and the mortgagee of the aircraft is obtained before such work or services are performed. For the purposes of this chapter the person named in the federal aircraft regis-

Defendants Finn after May 25, 1952.” The Finns took the plane from International’s possession on May 25, 1952, without its consent [R. 476-479]. Hence International’s lien was not lost. (See *Huie v. Howard Soo Hoo*, 132 Cal. App. (Supp.) 787, 793.)

However, the Government contends there can be no lien as against its interest, if any, without its consent (G. 53). That rule applies where the Government is carrying out its sovereign functions with respect to property to which it has full title. N 111H was not such an item of property after its sale to Vineland. If the Government retained any interest in the aircraft, it was certainly something less than the bundle of rights which we recognize as full ownership. International submits that such an interest, if any, was subject to lien.

Thus in *United States v. United Aircraft Corp.* (D. C. Conn., 1948), 80 Fed. Supp. 52, 2 Avi. 14663, War Assets Administration sold two aircraft to Hoosier and took back a mortgage on each. The mortgages were recorded with the CAA. Hoosier removed the engines from one aircraft and had them overhauled by United. United claimed an artificer’s lien superior to the Government’s mortgage. The Government sued in replevin. Defense, that the engines were not particularly described in the mortgage, and hence the mortgage was not binding on defendant. Held, for defendant. The court states:

“ . . . The statute, by its recordation requirement, voids as to third parties, without actual notice,

tration certificate issued by the Administrator of Civil Aeronautics shall be deemed to be the legal owner.”

Sec. 1208.64: “Whenever the lien upon any aircraft is lost by reason of the loss of possession through trick, fraud, or device, the repossession of such aircraft by the lienholder revives the lien, but the lien so revived is subordinate to any right, title, or interest of any person under any sale, transfer, encumbrance, lien, or other interest acquired or secured in good faith and for value between the time of the loss of possession and the time of repossession.”

conveyances not recorded. The principles of fraudulent conveyance of personalty without transfer of possession are to be applied except so far as notice to third persons has been given in accordance with the terms of the Federal statute.

* * * * *

“ . . . Here the instrument itself lacks a sufficiency of description of the engines to meet any standard of fair notice to third persons dealing with the engines under the circumstances in which engines are used and maintained.

“We do not reach the question whether an artificer’s lien can take precedence over a valid government lien, by way of mortgage, since the government lien on the engines is invalid as to third parties. Moreover, the case cited by the plaintiff, *U. S. v. Cardinale Warehousing Corporation et al.* (1946), 65 F. Supp. 760, would not be in point if the question of priority were before us. In that case there was no question but that the full title to the goods was in the United States. Liens on government property might well cripple the United States in carrying out its sovereign functions. No such danger is apparent in applying to the United States, as the holder of security for a debt, the same rules as to validity and priority of security as are applied to any citizen.

“Therefore, in a situation such as this, an artificer’s lien may take precedence over a government lien invalid as to third parties.”

The Government next contends that the California lien law is invalid since it is dependent on possession (G. 53). No cases are cited in support of this claim, and a similar claim was rejected by the court in *Davenport v. Grundy Motor Sales Co.*, 28 Cal. App. 409, 152 Pac. 932. There, plaintiff sold a car to X under a conditional sales con-

tract reserving title in the Seller. X left it with defendant who made repairs and asserted a lien under Vehicle Code, Section 3051, which provides: "a person who makes, alters or repairs any article of personal property, at the request of the owner, or legal possessor of the property, has a lien on the same for his reasonable charges for the balance due for such work done and materials furnished, and may retain possession of the same until the charges are paid." X defaulted and plaintiff sought to reclaim the car, contending that the statute was unconstitutional. Held, for defendant. One making repairs at the request of the legal possessor is protected by the statute.

In the aircraft lien law, the California legislature has simply declared that the registration certificate holder occupies the same status as the owner *for aircraft lien purposes*. If the legislature can constitutionally declare that a stranger to the title in the position of a legal possessor may occupy such status as in the *Davenport* case, it is difficult to see why it may not declare that the same stranger to the title in the position of the aircraft certificate holder may not.⁴² This does no more than declare who is authorized to contract a lien.

⁴²Nor is there any conflict between the state aircraft lien law and federal law.

The federal law (49 U. S. C. A., Sec. 521(f)) provides:

"* * * Registration shall not be evidence of ownership in any proceeding in which such ownership by a particular person is, or may be, in issue."

The state law (Code Civ. Proc., Sec. 1208.62) provides in part:

"*For the purpose of this chapter* the person named in the federal aircraft registration certificate issued by the Administrator of Civil Aeronautics shall be *deemed* the legal owner."

The chapter concerned is entitled "Liens on aircraft." It does not deal with *ownership* of aircraft, only with *liens*. A proceeding to declare and enforce a lien does not determine ownership, nor is ownership in issue.

F. International Has Prior Rights by Accession.

Apart from its claim of lien, International has rights by accession for the labor and materials bestowed by it on the aircraft. California Civil Code deals with acquisition of property, and modes by which property may be acquired. It recognizes that rights in property may be acquired by accession.⁴³ And this but declares established legal principles.

⁴³Sec. 1000: "Property is acquired by

1. Occupancy;
2. Accession;
3. Transfer;
4. Will; or,
5. Succession."

Sec. 1025: "When things belonging to different owners have been united so as to form a single thing, and cannot be separated without injury, the whole belongs to the owner of the thing which forms the principal part; who must, however, reimburse the value of the residue to the other owner, or surrender the whole to him."

Sec. 1026: "That part is to be deemed the principal to which the other has been united only for the use, ornament, or completion of the former, unless the latter is the more valuable, and has been united without the knowledge of its owner, who may, in the latter case, require it to be separated and returned to him, although some injury should result to the thing to which it has been united."

Sec. 1027: "If neither part can be considered the principal, within the rule prescribed by the last section, the more valuable, or, if the values are nearly equal, the more considerable in bulk, is to be deemed the principal part."

Sec. 1028: "If one makes a thing from materials belonging to another, the latter may claim the thing on reimbursing the value of the workmanship, unless the value of the workmanship exceeds the value of the materials, in which case the thing belongs to the maker, on reimbursing the value of the materials."

Sec. 1029: "Where one has made use of materials which in part belong to him and in part to another, in order to form a thing of a new description, without having destroyed any of the materials, but in such a way that they cannot be separated without inconvenience, the thing formed is common to both proprietors; in proportion, as respects the one, of the materials belonging to him, and as respects the other, of the materials belonging to him and the price of his workmanship."

In 1 American Jurisprudence, Accession, page 198, it is stated:

“The doctrines of the civil law in regard to accession were incorporated by Bracton in his treatise on the laws of England, and its rules and directions blended with those of the common law. They have been recognized ever since as the doctrines of the common law, and therefore were transplanted into American jurisprudence with the stock on which they were ingrafted. The true object of the rule is, first, to protect owners whose rights or property are invaded, and second to screen an involuntary and casual trespasser, who has expended of his own in good faith, from punishment more severe than mere carelessness or honest error deserves.”

And again (p. 207):

“. . . When the right to the improved article is the point in issue, the question of how much the property or labor of each has contributed to make it what it is must always be one of first importance. It is, therefore, a test applied in some cases, that where it can be shown that the labor and materials of an innocent trespasser contributed more to the value of the present chattel than those materials which he took without intending a wrong, he is entitled to keep the chattel as his own, making, however, due compensation to the owner of the materials for what he took.”

Thus in *Ochoa v. Rogers* (Tex. Civ. App., 1921), 234 S. W. 693, a plaintiff's stolen car fell into the hands of the Government, which sold it to defendant as junk for \$85. Defendant converted it into a truck by expending \$800, and plaintiff discovered and sought to reclaim it or its value, together with loss of use at \$5 per day. Held,

for plaintiff for \$85 only. "If one in wrongful possession be an innocent or unintentional trespasser, and in good faith enhances the value of the property, and such improvements exceed, or even substantially approach, the value of the article in its raw state when found, the property in dispute becomes merely accessory to the resulting product, and title thereto passes to the purchaser, who is liable to the original owner only for the market value of the lost article at the time it is found."

Even in respect to government property, an innocent accessor is protected. Thus in *E. B. Boles Wooden-Ware Co. v. United States*, 106 U. S. 432, defendant purchased timber in good faith from one who cut it in bad faith from government land and carried it to market. At cutting it was worth about \$60, and at sale to defendant it was worth \$850. Defendant added none of this increase in value. The court holds that Government could recover the entire value because of this circumstance, but states (p. 434):

" . . . the weight of authority in this country as well as in England favors the doctrine that where the trespass is the result of inadvertence or mistake, and the wrong was not intentional, the value of the property when first taken must govern; or if the conversion sued for was after value had been added to it by the work of the defendant, he should be credited with the addition.

* * * * *

" . . . If the case were one which concerned additional value placed upon the property by the work or labor of the defendant after he had purchased, the same rule might be applied as in the case of the inadvertent trespasser."

International's interest in the airplane, acquired as it was in the ordinary course of its business, and in good faith, should be protected. The Government's claim to the contrary (G. 53), that principles of accession do not apply as against it, is unsupported by any citation of authority.

Conclusion.

For each and all of the foregoing reasons, we submit that the judgment of the District Court should be affirmed.

Respectfully submitted,

A. J. BLACKMAN,

*Attorney for Appellee International
Airports, Inc.*

APPENDIX A.

Calif. Certification Symbol
4-A-95

WAR ASSETS ADMINISTRATION
OFFICE OF AIRCRAFT DISPOSAL—EDUCATIONAL AIRCRAFT DISPOSAL DIVISION
WASHINGTON 25, D. C.

PURCHASE ORDER

Agreement No. 1

Order No. 101

Date June 25, 1946

Ship to VINELAND Elementary School District

(Full name of Institution)

Rt. 6 Box 207 Bakersfield, Calif. Peter A. Bancroft

(Number)

(Street)

(City)

(State)

(Signature)

Catalog No.	Quantity	Nomenclature	Type	Disposal Cost		Quantity Shipped	Date Shipped	
				Unit	Total			
-2420	1	C46 Curtis Commands		200.00	200.00			
-2220	1	PSIC North Amer. Mustang		100.00	100.00			
-2620	1	AT6 North Amer. Texan		100.00	100.00			
					400.00			

APPENDIX B.

L-12

SALES RECEIPT

Received of PETER BANCROFT
(Purchaser or Authorized Representative)

purchases in name of VINELAND SCHOOL DISTRICT
(Purchaser)
ROUTE 6, BOX 207, BAKERSFIELD, CALIFORNIA
(address)

sum of THREE HUNDRED DOLLARS AND NO CENTS ----- \$ 300.00

Cash () Certified Check () Cashier's Check (☒) Bank Draft ()
representing payment (in full) (of balance) (down payment) on purchase
price of \$ 300.00 .

(1) AT-6
(1) C-46
Make _____ Service Model _____ Serv. Ident. No. _____ Mfg. Ser. No. _____

July 10, 1946

WAR ASSETS ADMINISTRATION

By R. P. Bates
R. P. BATES

International's Exhibit A-1.

APPENDIX C.

DEPARTMENT OF COMMERCE
CIVIL AERONAUTICS ADMINISTRATION

BILL OF SALE

for consideration
per agreement dated 28 February, 1951
AND IN CONSIDERATION OF \$10.00 and other good and valuable consideration OF THE FULL
LEGAL AND BENEFICIAL TITLE OF THE AIRCRAFT DESCRIBED AS FOLLOWS

AIRCRAFT MAKE *Cessna* SERIAL NO. *42-3645* CAA REGISTRATION NO. *111 H*
C-46 A

THIS 28 DAY OF February 1951
REBY SELL GRANT, TRANSFER, AND DELIVER ALL OF HIS RIGHT, TITLE, AND INTEREST IN AND TO SUCH AIR-
CRAFT UNTO:

NAME OF PURCHASER *Charles C. Finn* *George C. Finn* 545613
ADDRESS OF PURCHASER (Number, street, city, zone, and State)

6075 Franklin Ave., Hollywood, 28
California

TO their EXECUTORS, ADMINISTRATORS, AND ASSIGNS, TO HAVE AND TO HOLD
REGULARLY, THE SAID AIRCRAFT FOREVER, AND CERTIFIES THAT SAME IS NOT SUBJECT TO ANY MORTGAGE OR
OTHER ENCUMBRANCE EXCEPT:

NAME OF ENCUMBRANCE AMOUNT

FAVOR OF

TESTIMONY WHEREOF I HAVE SIGNED MY HAND AND SEAL

THIS 14 DAY OF April

NAME OF SELLER

Vineyard School District

(Signature to ink)

John A. Bancroft, Superintendent
LE (If signed on behalf of a Corporation or Partnership or if signed by an Agent)

Superintendent

ACKNOWLEDGMENT

STATE OF California

COUNTY OF Kern

THIS 14 DAY OF April 1951

BEFORE ME PERSONALLY APPEARED THE ABOVE-NAMED SELLER, TO ME KNOWN
TO BE THE PERSON DESCRIBED IN AND WHO EXECUTED THE FOREGOING BILL OF
SALE, AND ACKNOWLEDGED THAT HE EXECUTED THE SAME AS HIS FREE ACT AND
DEED, GIVEN UNDER MY HAND AND OFFICIAL SEAL THE DAY AND YEAR ABOVE
SET FORTH.

NOTARY PUBLIC

MY COMMISSION EXPIRES

Raymond M. Bohring

READ INSTRUCTIONS AT RIGHT CAREFULLY

No. 14770.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

GEORGE C. FINN, CHARLES C. FINN, INTERNATIONAL AIR-
PORTS, INC., a Corporation, PETER A. BANCROFT and VINE-
LAND ELEMENTARY SCHOOL, DISTRICT OF KERN COUNTY,

Appellees,

and

VINELAND ELEMENTARY SCHOOL, DISTRICT OF KERN
COUNTY, CALIFORNIA,

Appellant,

vs.

UNITED STATES OF AMERICA, GEORGE C. FINN, CHARLES C.
FINN, and INTERNATIONAL AIRPORTS, INC.,

Appellees.

APPELLANT VINELAND'S REPLY BRIEF.

FILED

ROY GARGANO,
County Counsel,

JAN - 3 1956

KIT L. NELSON,
Assistant County Counsel,

PAUL P. O'BRIEN, CLERK

1110 West 26th Street,
Bakersfield, California,

*Attorneys for Appellant Vineland Elementary
School District of Kern County, California.*

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No. 14770.
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

GEORGE C. FINN, CHARLES C. FINN, INTERNATIONAL AIR-
PORTS, INC., a Corporation, PETER A. BANCROFT and VINE-
LAND ELEMENTARY SCHOOL DISTRICT OF KERN COUNTY,

Appellees,

and

VINELAND ELEMENTARY SCHOOL DISTRICT OF KERN
COUNTY, CALIFORNIA,

Appellant,

vs.

UNITED STATES OF AMERICA, GEORGE C. FINN, CHARLES C.
FINN, and INTERNATIONAL AIRPORTS, INC.,

Appellees.

APPELLANT VINELAND'S REPLY BRIEF.

The only Appellee who has responded to Appellant Vineland's Opening Brief is International Airports, Inc., and therefore this Reply Brief will be confined to answering in the order set forth herein below the following arguments indicated in said Appellee's Brief.*

I. "The Documents Show a Plain Intent to Transfer Title." (I. A. 49);

II. "As a Bona Fide Purchaser (Encumbrancer, Accessor), International Is Entitled to Prior Rights in the Plane. International Is a Bona Fide Purchaser (Encumbrancer, Accessor)." (I. A. 58);

*Page references to Appellee International Airports, Inc., Answering Brief shall be hereinafter designated as (I. A.).

III. "As Against International, Vineland Is Estopped to Deny That It Passed Title to the Finns." (I. A. 67);

IV. "International Has Prior Rights by Accession." (I. A. 77).

ARGUMENT.

I.

Right, Title and Interest to the Aircraft in Suit Did Not and Has Not Passed From Vineland to the Finns.

International argues that the Agreement [Vineland's Ex. "B"] shows a plain intent to transfer the title (I. A. 49-51). To substantiate this allegation International quotes paragraphs I and II of said Agreement, which paragraphs this Appellant, in its Opening Brief,** admitted appeared to transfer present title (V. 9). As pointed out in said Opening Brief, however (V. 8-9), said Agreement in paragraph 4 [R. 62] clearly indicates that the Agreement was *contingent* upon the contractors' ability to secure the necessary clearances of the Government, *notwithstanding* any other provisions in the Agreement.

Even though paragraphs appear in the subject Agreement indicating present transfer of title, the true Agreement between the District and the Finns, which must be determined as the lawful Agreement and the terms and conditions under which the parties are bound, is that which is made up by the Notice for Bids [Vineland's Ex. "A"] and the Bid as accepted. A notice for bids is an invitation by a public agency for offers. The bids, in compliance with such notices, are in the nature of irrevocable

**Page references to Appellant Vineland's Opening Brief shall be hereinafter designated as (V.).

offers by the contractors. Upon acceptance of the contractor's bid, a contract comes into existence in accordance with the terms and conditions as set forth in the notice and bid as accepted (*Kemper Construction Company v. City of Los Angeles*, 37 Cal. 2d 696). Any formal agreement entered into after acceptance of such a bid must be read so as to carry out the intent as indicated in the notice for bids and the bid as accepted. Any clauses in the subsequent formal agreement, which are contrary or go beyond the notice for bids and the bid as accepted, would be illegal and void, and therefore must be ignored. (*Ryan v. Ashbridge*, 10 Pa. Dist., R. 153, 160, 161; *Miller v. McKinnon*, 20 Cal. 283.) In the instant case, there is clearly no indication in the notice for Bids or in the Bid as submitted by the Finns and accepted by the District which would indicate that the District intended to pass title, except subject to certain conditions precedent (the argument of Vineland is not based upon a "false assumption" as alleged by International (I. A. 52)), *i. e.*, the notice points out that the aircraft was acquired from the Government and the War Assets Administration, and that it was "subject to certain restrictions on the use thereof under the deed of conveyance," and that "the successful bidder will be *required to secure* the necessary releases to said restrictions from the proper governmental agency of the United States of America." Contrary to showing any intention to pass immediate title, said Notice makes it clear that the sale would be a conditional one. That the bidder "will be required" indicates a present intention that such "will be required" prior to any consummation of an unconditional sale. This intention of condition precedent is borne out by the subsequent formal agreement (as pointed

out above, said agreement must be interpreted so as to comply with the notice) in that said agreement is made *contingent* upon contractors' ability to obtain the subject releases, and this contingency is *notwithstanding* anything to the contrary on the agreement. Therefore, International's argument concerning the clear language of transfer of title through paragraphs I, II and III of the subject Agreement [Vineland's Ex. "B"] must fall. To construe the Agreement otherwise would be to rewrite the agreement for the parties and construe the Agreement so as *not* to give it legal effect; this would be clearly contrary to thoroughly recognized rules of construction.

International argues that it was not necessary for the Finns to obtain releases of restrictions which were not required by law (I. A. 51). There does not appear to be anything in the Notice for Bids [Vineland's Ex. "A"], nor in the subsequent Agreement, which indicates that the District intended that such restrictions, as appeared in the transfer documents from the Government, were not to be released by the Government whether they were legally enforceable or not. (If the District intended to waive any restrictions appearing in the transfer documents which could later be proved by the Finns, or anybody else, to be improper, this could have and would have been so provided.)

It matters not whether the District knew or cared that such restrictions were enforceable, valid or even proper. The restrictions were called to the attention of the bidders and it was made clear that releases were to be obtained. The District may well have been aware of the possible invalidity of the restrictions, but in a spirit of comity and cooperation with the Federal Government the district first demanded this release.

If the District desired only the narrow removal of restrictions as indicated by International, it would have provided for removal of the *legal and proper* restrictions, or some such other language. Instead, the District demanded “removal of the necessary releases to *said* restrictions.” *Said* restrictions can only mean those which appear on the face of the transfer documents, not a determination by the bidder as to which ones are valid.

The Agreement also indicates an intended separation of requirements of removal in (1) the transfer documents and (2) the “related Federal laws,” by providing:

“. . . this agreement is contingent upon Contractors’ ability to secure the necessary clearances from the Government of the United States of America on restrictions now existing on the use and possession of the afore-described C-44 Aircraft #23645, by virtue of the Deed of Conveyance of said aircraft from the said Government of the United States to the District, *and* by virtue of related Federal laws on the use thereof.” [R. 62.]

The conjunctive “and” in said clause thus indicates (1) restrictions appearing on the face of the transfer documents, whether or not they exist in the law, *and* (2) restrictions appearing in related *laws*. By International’s own argument (I. A. 51), the words “by virtue of” are intended to mean “in,” thus the restrictions “in” the transfer documents is intended to mean those appearing on its face, regardless and separate from any related laws.

Even adopting International’s argument that the “sales receipt” [International’s Ex. “A”] is the sale document to the District from the Government, clearly the District intended the Form 65 Agreement when in the “Notice for Bids” it called attention to restrictions on *uses* of the air-

craft. The District also indicates such intent in its Agreement by again referring to the restricted *uses*; it remained a burden upon a bidder to determine what those restrictions were and where they were to be found. The Finns certainly knew of the restrictions since one of them went to Washington in an attempt to obtain the releases. [R. 353-354.]

The word "necessary" before the word "releases" indicates that releases must be obtained which the District demanded as necessary or in the absence thereof, according to the contemporaneous construction of what releases were in *fact* as well as in law deemed necessary. The agency which set them forth and from whom the releases were to be obtained, *i. e.*, the Government would be the proper agency to make such a determination. Certainly, it was not meant that only those releases which the Finns determined in a quasi judicial manner to be necessary or as may be determined by future court action as necessary was intended. There would have been no purpose for the requirement if the bidders were to make such a determination, nor did the District bargain for the purpose of "buying a lawsuit."

Even assuming no violation of the release conditions, there was clearly no performance of other conditions *re* payment and performance. International indicates that Vineland received "part performance" (I. A. 55). International cites no case law nor does it pursue the point beyond mentioning the doctrine. The part performance doctrine is strictly construed and appears in California as an exception to the Statute of Frauds in transfers of real property only. The doctrine would appear to have no place in the subject case. Also, clearly here, where there has admittedly been *no* payment whatsoever of the cash

consideration, there can be no part performance. *Sole use* of the subject aircraft remains in the District until *all* of the terms and conditions of the Agreement are fully performed by Contractors [Par. II, R. 60]:

“The Contractors hereby agree, and do hereby accept the possession and title of said C-46 Aircraft #23645, as evidenced by this agreement, and the aforesaid Bill of Sale and/or transfer of title; provided, however, the Contractors agree that irregardless of the transfer of possession and title of said C-46 Aircraft #23645, the *sole use* of said aircraft shall be and the same is reserved to the District for educational purposes only, until such time as *all* of the terms and conditions set forth in this agreement are fully performed by Contractors in a reasonable and competent manner; . . .”

This reservation of the *sole use* of the aircraft in the District certainly allows no “part performance.” To the contrary, the reservation again indicates the clear intent to grant subject to a condition precedent, or at least only an equitable title under a conditional sales contract. International has received no greater title in the aircraft than the Finns have obtained, and thus any judgment granting any rights to possession, use or title to the Finns or International in the subject aircraft must be found subject to Vineland’s prior title and right to use of the subject aircraft.

The *actions* and the testimony of the Finns in returning the subject aircraft to Bakersfield in May of 1952 at the request of the School District’s counsel [R. 474-475] and the finding of the jury in answer to Interrogatory No. 2 [R. 112] and Interrogatory No. 7 [R. 113] (see in this connection V. 12) is further indication of the meaning of the terms of the Agreement

between the District and the Finns. The actions of the Finns clearly shows that they too recognized the District's rights in the aircraft.

Reliance of International in its argument on the salvage clause of the subject Agreement (I. A. 53) would appear to be of no consequence, since the lower court has found the Finns never intended to do anything but put the aircraft into commercial flight use. However, even assuming the salvage clause applicable, it, too, is subject to the provision "that the contractors have fully performed *all* the conditions of this agreement." There is even serious question as to the validity of the clause itself, since no similar provision or exception was provided for in the "Notice for Bids."

International points out Vineland's omission to cite the direct constitutional provision relied upon in arguing that performance must first, or concurrently, be obtained by a school district (a condition precedent), or the district would be lending its credit to a private person. The pertinent part of said Article IV, Section 31 of the California Constitution provides as follows:

"The Legislature shall have no power to give or to lend, or to authorize the giving, or lending, of the credit of the State, or of any county, city and county, city, township or other political corporation or subdivision of the State now existing, or that may be hereafter established, in aid of or to any person, association, or corporation, whether municipal or otherwise, or to pledge the credit thereof, in any manner whatever, for the payment of the liabilities of any individual, association, municipal or other corporation whatever; nor shall it have power to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever; . . ."

Veterans' Welfare Board v. Jordan, 189 Cal. 124, at 128, provides as follows:

“So far as our research reveals, the decisions are unanimous upon the proposition that this provision of the constitution prohibiting the giving or loaning of credit should be construed liberally to effect its purpose. Such construction would, therefore, prohibit any plan or scheme by which in substance and effect the credit of the state is given or loaned, regardless of the particular form which the transaction takes.”

International argues Vineland is not lending its credit—the Finns are lending their credit. This is erroneous if the present contract is construed by this Court as passing title to the Finns prior to payment therefor of the cash consideration or the performance of other considerations. The District, which is a political subdivision of the State of California, has thus lent its *credit* to the Finns. There has been “in substance and effect” a lending of the credit of the School District. The District has in effect borrowed the contract price, or value of the aircraft, from the taxpayer and loaned said amount to the Finns to be repaid by the Finns at a later date, and, which at the date of the trial, over three years later, had not yet been paid. Only if the contract is construed as reserving the title and use in the District, even if the District is not putting the aircraft to an educational use at the present time, can the present contract be construed as valid. To reach this conclusion, the contract must be construed as providing for a condition precedent to passage of said title and use, or at least a conditional sales contract passing only equitable title with a right of re-possession at the will of the District upon default of the Finns.

That the Finns are, in fact, in default is clear in the record as is indicated in Vineland's Opening Brief (V. 12-13). Although an allegation of default and notice thereof may be necessary in a cross claim in the subject action between the District and the Finns, such would not appear necessary to the decision of the Court here as to the declaratory relief action between the Government and the District and in determining the nature of Vineland's interest and title in the aircraft. In other words, if a condition precedent or conditional sales contract exists, there has been no transfer of full title in the aircraft to the Finns, at best it is merely an *attempt* to do so. At most, this point of default would have to be determined as not having been placed before the Court and is undecided; and, therefore, any judgment, finding or conclusion granting, finding or concluding that right, title and interest to the subject aircraft belongs to anyone but the School District would be improper. Testimony of an agent of the District who is not a member of its board of trustees that "we never saw any evidence that they would not perform" their contract is not evidence that the Finns were not, in fact, in default. (International's Br. p. 55.) Nor does the matter of notice of default appear to be appropriate to show that conditions precedent to title passage have been performed, nor that *legal* as distinguished from equitable title has been transferred to anyone other than the District until *all* conditions have been performed. Also, clearly the *use* of the subject aircraft remains in the District, even assuming legal title passed until *all* conditions were performed.

International argues (I. A. 54-55) that no ambiguity appears in the subject Agreement [Vineland's Ex. "B"] for which parol evidence may be admitted, and that this was a matter for the trial court to decide and the trial

court did so by its finding as follows: “on February 28, 1951, (Vineland) did sell and did transfer constructive possession of said aircraft Defendant Charles C. Finn and Defendant George C. Finn [R. 150].”

International then points out that conflicting findings by the jury and adopted by the Court must be ignored, since a specific finding of the Court controls a general finding (I. A. 55).

First, this Appellant agrees that no ambiguity appears in the Agreement; to the contrary, it appears clear that said Agreement provides a condition precedent to passage of title, or at least a conditional sale, with legal title in the District. But assuming an ambiguity in that the Agreement, in the first part thereof, provides for immediate transfer of title, and later clauses indicate conditions “notwithstanding” such provisions, and also no indication of intent to pass title in the “Notice for Bids”, then the intention of the parties becomes important. The jury and Court, in adopting their findings found in favor of the District. In this regard, see Answer to Jury Interrogatories No. 2 [R. 112] and No. 7 [R. 113]. Instead of determining, as International has, that the District Court has thus been inconsistent, surely the District Court’s determination must be construed so as to indicate consistency therein. And consistent they are for the finding of the Court quoted above [R. 150] that the District “did sell” said aircraft to Finns is not determining the *nature* of such sale. In other words, the Court has left unanswered the question of whether said sale is subject to a condition precedent or of equitable title only. That the Court recognizes the possibilities of a defeasible sale is indicated when in the same finding the Court finds that only “constructive possession” was transferred. Also, the Court indicates that the nature of the sale is

apparently to be determined in later action between the District and the Finns, and consequently anyone claiming under the Finns, in that it found, concluded and determined, in general, that the Court's findings, conclusion and judgment shall be without prejudice to any other claims which Vineland or Bancroft may have against the Finns [R. 155, 158, 161]. This action by the Court was necessary since there was no cross claim in the action between the Finns and Vineland, none being compulsory or necessary in the action. The District Court, if it erred, did so to the extent that it made any finding, conclusion or judgment of right, title and interest in the subject aircraft, placing title or a right of possession thereof in anyone other than Vineland (see Vineland's Specification of Errors in V. 2-3).

II.

As Between International and Vineland, International is Not a Bona Fide Purchaser (Encumbrancer, Accessor).

International's argument concerning application of Section 25 of the Surplus Property Act does not concern Vineland (I. A. 58-59).

International argues, apart from said Act, that it is nonetheless a bona fide purchaser in that the Court found International to be in "good faith" in believing the Finns were the true and lawful owners of the aircraft. International then concludes that the Court, by this specific finding, has overruled the jury's general findings (adopted by the Court) and has thus found International to be a bona fide purchaser. This conclusion is clearly erroneous. Again, the rules of construction are not to be stretched to find an inconsistency, but to the contrary every effort must be made to find consistency in con-

struing the actions of the lower court. Good faith belief is only one element in the requirement of a bona fide purchaser; a separate and distinct element is that such person be without notice, either constructive or actual. Here the Court could well find that International in "good faith" believed, and yet adopt the finding of the jury, that International had either "notice or knowledge" of Vineland's interests and claims, which, of course, would destroy International's position as a bona fide purchaser. There is a duty on a purchaser to *investigate* interests and claims of others, not merely to blindly place their *faith* in those with whom they are dealing.

III.

Vineland School District Is Not Estopped to Deny That It Passed Title to the Subject Aircraft to the Finns.

Contrary to the position taken by International in its answering brief (I. A. 67-71), Vineland is not estopped to deny that it passed title to the Finns either under estoppel by deed or estoppel *in pais*.

International in its argument for estoppel by deed sets forth statements in a "Bill of Sale" given by Bancroft (I. A. 67-68) and in Vineland's agreement [Vineland, Ex. B] (I. A. 68-69) indicating that the district had acted in such a way so that it is now estopped. Nowhere does International show where it *relied* on either document to its detriment. Clearly such reliance is essential to a finding of estoppel. To the contrary the evidence is clear that International relied upon a C. A. A. registration [R. 620, 633] and also apparently on a letter from an aircraft title company [R. 626-628, 633; International's Ex. L]. This International relied upon even though it knew the plane was a war surplus aircraft and

was purchased by the Finns from Vineland School [R. 620-621], and also even though the C. A. A. record [Pltf. Ex. 7] provided therein on page 2 that the sale of the aircraft from Vineland to Finns was "contingent upon the agreement in writing executed between the Vineland School District and Charles C. Finn and George C. Finn, dated February 28, 1951" [R. 637]. International also had a personal friend check this C. A. A. file for the title flaws and encumbrances [R. 635-636]. The Court and jury of course found International had both notice and knowledge of Vineland's interest and claims to the aircraft [Answer to Interrogatories #10 and #11, R. 114].

Even assuming that the facts indicate that the elements of the doctrine of estoppel has been complied with, International cites no cases where the doctrine of estoppel by deed has been applied against a governmental agency.

The doctrine of estoppel whether by deed or *in pais* has been sparingly applied and then only in extreme hardship cases. Although the doctrine of estoppel has been applied against a public agency in the past where such agency is one which has authority to act and has acted in a *proprietary* capacity it has only been in recent years that any estoppel has been applied against a public agency acting in its *governmental* capacity. International cites paragraphs from cases which indicate the ruling as to public agencies acting in their *proprietary* capacity which are clearly inapplicable here (*People v. Gustafson*, 53 Cal. App. 2d 230; *Brown v. Town of Sebastopol*, 153 Cal. 704).

A school district is one of the most restricted public agencies known to the law. (*Pasadena School District v. City of Pasadena*, 166 Cal. 7; *Denman v. Webster*, 139 Cal. 452; *The MacMillan Co. v. Clarke*, 184 Cal. 491; *Skelly v. School District*, 103 Cal. 652, 659; *People v. Rinner*, 52 Cal. App. 747.) Nowhere in the statutes governing school districts is there any authority to act in a *proprietary* capacity. Unlike a municipality it is not in

the nature of a school district to enter into a business capacity.

The only case which International cites where estoppel has been applied in California to a public agency where a public officer and said agency were acting in a governmental capacity is *Farrell v. County of Placer*, 23 Cal. 2d 624. This case, however, is to be strictly construed to its facts since it is a departure from the general rule. Said case was one where extreme hardship was involved and was an application of estoppel to set aside a harsh procedure rule of 90 days limitation of time to file a claim against a county and where a county agent had *directly* misled the plaintiff. No such harsh facts appear in the present case. International alleges no such facts of reliance on the districts actions and as pointed out above none in fact appear.

To the extent, if any, that this Court finds the agreement [Vineland's Ex. B] is one wholly beyond the scope of the power of the school district, there can be no estoppel against the school district to its raising the defense of the illegality of the contract. To permit an estoppel in such a situation would be to defeat a strong public policy and result in indirect enforcement of illegal contracts. The general rule has been stated by the Courts of this State on numerous occasions that contracts beyond the statutory power of the political subdivision, such as a school district, are void, and the mode of contracting as prescribed by statute is the measure of the power of that political subdivision to contract, and a contract made in disregard of the prescribed mode is void and unenforceable. (*Miller v. McKinnon*, 20 Cal. 2d 83, 88; *Inyokern Sanitation District v. Haddock-Engineers Ltd.*, 36 Cal. 2d 450, 454; *County of San Diego v. California Water and Telephone Company*, 30 Cal. 2d 817, 825; *Bear River Sand and Gravel Corp. v. County of Placer*, 118 Cal. App. 2d 684, 689; *Estate of McMillin*, 133 A. C. A. 713, 731; *Stockton Morris Plan Company v. California Tractor and Equipment Corp.*, 112 Cal. App.

2d 684, 689; *Farrell v. Placer County*, 23 Cal. 2d 624, 631; *Charles L. Harney Inc. v. Frank B. Durkee*, 107 Cal. App. 2d 570, 578; *Los Angeles Dredging Co. v. Long Beach*, 210 Cal. 348; *Reams v. Cooley*, 171 Cal. 150; *Zottman v. San Francisco*, 20 Cal. 96.) To permit an estoppel to be raised in such situation would be to deny the invalidity of such a contract and would operate to defeat the public policy which the statutory measure of power it was designed to protect. This rule is well stated in the case of *County of San Diego v. California Water and Telephone Company*, 30 Cal. 2d 817, at page 826, where it is stated as follows:

“It is clear, . . . , that neither the doctrine of estoppel nor any other equitable principle may be invoked against a governmental body where it would operate to defeat the effective operation of a policy adopted to protect the public. (See *Miller v. McKinnon*, 20 Cal. 2d 83 (124 P. 2d 34, 140 A. L. R. 570), and cases cited therein; *Pan Amer. Co. v. United States*, 273 U. S. 456, 505-506 (47 S. Ct. 416, 71 L. Ed. 734); *American Surety Co. of N. Y. v. United States* (C. C. A. 10th), 112 F. 2d 903, 906.) In the American Surety Company case the court stated that the government could not be estopped so as to ‘frustrate the purpose of its laws or thwart its public policy.’ (112 F. 2d, at p. 906.) In 3 McQuillin, Municipal Corporations (2d ed., 1943), section 1266, it is said that various statutory procedures or steps exist to protect citizens and taxpayers from ill-considered contracts or those showing favoritism and that if recovery is allowed for property or services on the ground of estoppel or implied contract, ‘then it follows as the night the day that the statute or charter provision can always be evaded and set at naught.’ The author adds that the rule denying indirect enforcement of such void contracts harmonizes with our governmental system, appears to be supported by reason, and is not unjust, because the other party is charged with notice of the law. (See, also, *Miller v. McKinnon*, 20 Cal. 2d 83, 88-89 (124 P. 2d 34, 140 A. L. R. 570).)”

The rule prohibiting an estoppel where the contract is illegal is so strong that the Supreme Court of the State of California has refused to enforce illegal contracts regardless of whether or not the matter has been advanced in the lower court. (*Fewel & Dawes Inc. v. Pratt*, 17 Cal. 2d 85, 91-92; *Morey v. Paladini*, 187 Cal. 727; *Stockton Morris Plan Company v. California Tractor and Equipment Corp.*, 112 Cal. App. 2d 684, 690.)

Even where the governmental body has received benefits as the result of the illegal contract the illegality may nevertheless be shown and no estoppel can be raised. As was stated in *County of San Diego v. California Water and Telephone Company*, 30 Cal. 2d 817, 830:

“All of the California cases hold, however, that receipt of benefits by the governmental body is insufficient to raise an estoppel where, as here, the transaction is unauthorized by law and contrary to public policy.”

(Citing *Miller v. McKinnon*, *supra*; *Mullin v. State*, 114 Cal. 578; *Miller v. City of Martinez*, 28 Cal. App. 2d 364; *County of Shasta v. Moody*, 90 Cal. App. 519, and cases from other jurisdictions.)

IV.

International Airports Has Not Acquired Prior Rights by Accession.

Vineland recognizes that rights and property may be acquired by accession as is pointed out by International in its Answering Brief (p. 77); however, it is submitted that under the facts applicable to the present case no title was acquired by International by accession.

It should be noted that it was found by the trial court in the Special Verdict, Interrogatory No. 11 [R. 111] that International Airports Inc. *had either knowledge or notice* of the existence of interests and claims of defendant Vineland School District to the aircraft in suit under the Agreement between Vineland and defendants Finn at the time International performed labor and furnished

materials of the value of \$10,200 for the repair and improvement of the aircraft. In view of the fact that International knew of Vineland's interest in the plane at the time such repairs were made, it follows that International acted as a wilfull trespasser in performing such repairs and adding materials to the subject aircraft. Under California Civil Code, Section 1031, Sections 1025 through 1030, inclusive, are inapplicable when a person wilfully uses the materials of another without his consent. In such cases the product of the work and addition of materials belongs to the owner of the material if its identity can be traced. In the present case International added materials and workmanship to the aircraft in suit without the consent of Vineland School District but with knowledge that said school district claimed an interest in the aircraft. Accordingly International, as a wilfull trespasser or conscious wrong-doer, did not acquire title to the aircraft even though the improved aircraft was of greater value than when the repairs were commenced. As is pointed out in 1 American Jurisprudence 204, a conscious wrong-doer or a "trespasser who wilfully takes the property of another can acquire no right or title to it on the principle of accession, but the owner may reclaim it whatever alteration of form or species it may have undergone if he can prove that it was made out of his property regardless of whether he can identify the original materials in the new article." In other words, the test as to whether title can be acquired by accession is whether the party had knowledge that he was violating the rights of another and deliberately disregarded such rights. (1 Am. Jur. 203.)

Even if it should be assumed that the additions to the aircraft were made with the knowledge and consent of Vineland School District (the facts clearly show International never checked with Vineland), International Airports Inc. still had knowledge that Vineland claimed an interest in the aircraft. Consequently the additions to the aircraft in question should be treated as no more

than ordinary repairs which merge in the principal thing with the result that the aircraft, together with the additional materials, belongs to the owner of the original article, that is, Vineland School District. It is submitted that the provisions in the California Civil Code (Secs. 1025-1033) were not intended to change the common law rule that ordinary repairs made with the consent of the owner do not result in a transfer of title to the person making such repairs. (See 1 Am. Jur. 200, Sec. 6.)

If it should be determined that a transfer of title by accession did occur, it becomes important to determine the value of the aircraft both prior and subsequent to such repairs. The trial court in its Special Verdict [R. 116-117] found that the value of the subject aircraft on various dates was as follows:

February 28, 1951	\$20,000
April 14, 1951	\$25,000
October 26, 1951	\$25,000
July 3, 1952	\$50,000

It was further found by the trial court in its Findings of Fact [R. 152] that the repairs and improvements which were made by International upon the subject aircraft were made between October 26, 1951 and May 25, 1952, and that the reasonable value of such labor and materials was \$10,200. From the foregoing figures it appears that at the time International commenced said repairs and improvements the subject aircraft had a value of \$25,000 and that the value of the improvements was an additional \$10,200 or a total of \$35,200. No finding was made as to the reasonable value of the aircraft on May 25, 1952, at which time International had completed its repairs and improvements of the subject aircraft. It can only reasonably be assumed that the difference in value of the aircraft after such repairs and improvements were made, which was \$35,200, as compared with the value on July 3, 1952 of \$50,000, was due to the then current rise in the market for such type of aircraft. It appears then from the foregoing that the value of the repairs and

improvements made by International at best consisted of \$10,200 of an aircraft valued at \$35,200, or less than one-third of the total value of the plane. Clearly then the owner of the principal part of the improved plane was Vineland and not International Airports Inc. It is provided in California Civil Code, Section 1025, that "when things belonging to different owners have been united so as to form a single thing and cannot be separated without injury, the whole belongs to the owner of the thing which forms the principal part; who must, however, reimburse the value of the residue to the other owner or surrender the whole to him." Assuming that it should be held that the rule of accession applies to the instant case, the school district would have discretion under the provisions of Section 1025 to reimburse International for the value of the repairs and improvements which were made or to surrender the whole aircraft to International.

It is submitted, however, that International is not entitled to the benefits of the doctrine of accession for the reason that all of the subject repairs and improvements were made by International with full knowledge of the interests which Vineland School District claimed in the subject aircraft and that such repairs and improvements were merely ordinary repairs which inure to the benefit of Vineland School District.

Conclusion.

It is submitted that the judgment should be reversed as to those matters set forth in Appellant Vineland's Opening Brief under Specification of Errors (V. 2-3) and affirmed as to all other matters.

Respectfully submitted,

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School District of Kern County, California.

In the United States Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

GEORGE C. FINN, CHARLES C. FINN, INTERNATIONAL
AIRPORTS, INC., A CORPORATION, PETER A. BANCROFT
AND VINELAND ELEMENTARY SCHOOL DISTRICT OF
KERN COUNTY, APPELLEES

AND

VINELAND ELEMENTARY SCHOOL DISTRICT OF KERN
COUNTY, CALIFORNIA, APPELLANT

v.

UNITED STATES OF AMERICA, GEORGE C. FINN, CHARLES
C. FINN, AND INTERNATIONAL AIRPORTS, INC.,
APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

REPLY BRIEF FOR THE UNITED STATES

FILED

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(I)

**In the United States Court of Appeals
for the Ninth Circuit**

No. 14770

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APPELLEES

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION*

REPLY BRIEF FOR THE UNITED STATES

We believe that, for the most part, the contention raised by appellees Vineland and International in their respective briefs have been answered in the Government's opening brief; however, some comment is appropriate in regard to a few issues discussed by them. No argument will be presented relating to Vineland's brief as appellant, since the part of the

decision from which Vineland appeals does not immediately concern the Government. Likewise, no comment will be made about the brief of Appellees Finn, if any, because at the time this reply brief was being prepared, we had not as yet received any briefs filed on behalf of the Finns even though the time therefore has already expired.¹

1. *The Plane's Value When Transferred to Vineland.* Both Vineland (Vin. Br., pp. 17-20, 22-25) and International (Intl. Br., p. 5) rely heavily upon the fact that governing administrative regulations and procedure permitted transfers to educational institutions only if the property was "commercially unsalable." Vineland argues that the statutory purposes referred to by the Government in support of the restrictions of WAA Form 65 (*e. g.*, to prevent disruption of the market and related economic repercussions) are therefore inapplicable, on the theory that the sale of a valueless plane could not adversely affect the market.² In accordance with the regulation relied upon by appellees, the War Assets Administration de-

¹ The Government has deferred filing this reply in the expectation that it would file a single reply to the briefs of all the appellees, including the Finns. In view of the Finns' failure to file a brief and the scheduling of oral argument on February 1, 1955, thought it undesirable to delay further the filing of a reply to the briefs already received. Consequently, this brief contains our reply to the briefs of Vineland and International, and we may submit a further reply brief directed to the Finns' brief should the court permit them to file out of time.

² It is interesting to note that, at the same time, Vineland takes the somewhat inconsistent position that other statutory objectives compelled the Government to transfer the plane with a minimum of restrictions so that it could be used for diverse economic purposes. If, as Vineland suggests, the plane was essentially un-

terminated that the dumping of some 11,000 planes would have effectively destroyed the market for such aircraft and the financial stability of all persons connected with it. Thus, collectively the sale of these planes into commercial channels would have made each worth very little, but individually each plane was valuable as the record in this case establishes. Expert testimony valued the plane in suit at \$5,000 on the date it was transferred to Vineland (R. 281, 285, 292), the advisory jury accepted that valuation (R. 116), and the district court incorporated the jury's responses into its findings of fact (R. 156) and repeated that value in its own separate finding (R. 150). The decision to sell the planes to schools can be considered as a compromise between the views of those who urged that all such planes be totally destroyed, for fear of their undermining the market, and of those who wished them to be sold outright, in the hope that they would benefit other portions of the economy. By transferring the planes to educational institutions with severe restrictions on the school's power to sell or use the planes, it was possible to gain some benefit from the planes without causing serious economic disturbances.

2. *Estoppel*. Vineland argues that it cannot be estopped to deny the validity of WAA Form 65 (Vin. Br., pp. 39-40) because the school could not have agreed to or acquiesced in an illegal act. However, the authorities which Vineland relies upon

salable or worthless, no significant interference with its use results from the imposition of requirements that it be scrapped or that it not be flown.

merely repeat the established principle that a sovereign cannot be estopped by actions of its agents beyond their legal authority (Gov. Op. Br., p. 53, fn. 34). Thus, the school district could not be estopped to deny the validity of their sale to the Finns because the Superintendent had no legal authority to issue title documents where the sale had not conformed with the California statutes relating to sale of school property. Similarly, if the terms of WAA Form 65 were inconsistent with the Federal regulation or statute, the War Assets Administration employees who transferred the plane to Vineland on those terms were acting beyond their authority, and the Government could not be estopped to urge against all but a bona fide purchaser (see *infra*, p. 5) that the transfer to Vineland was void. There is no basis, however, for Vineland's contention that the authorized acts of its agents, in accepting Federal surplus property and agreeing to the terms of transfer, cannot serve as the basis for an estoppel or acquiescence in the terms as specified by WAA Form 65.³

³ On p. 43 of the brief for Vineland as appellee, it is contended that the issue of estoppel was not raised in the district court and is therefore unavailable in this Court. If Vineland means by this that the Government did not urge an estoppel in its complaint, where it would have been anticipatory pleading, they are quite right; and of course the issue was not raised in a replication since that pleading has been eliminated under the Federal Rules of Civil Procedure. However, the issue was presented to the district court in the Government's second supplemental memorandum in opposition to a motion to dismiss at pp. 16-17 (filed December 19, 1952), in the Government's reply memorandum of law at p. 7 (filed November 3, 1954), and in the statement of points on which appellant intends to rely (R. 1,002; Nos. 4, 5).

Relying upon this Court's decision in *United States v. Jones*, 176 F. 2d 278 (C. A. 9), International argues that the Government is estopped to deny that it has sold the plane to the school without any restrictions. The *Jones* case and Section 25 of the Surplus Property Act, which it interprets, stand for the proposition that sales documents issued by a disposal agency cannot be subsequently attacked by the Government as unauthorized in a suit against a bona fide purchaser. In the *Jones* case, the Government was not allowed to rescind an undisputed sale on the ground that the sale price had been unconscionably low through administrative error. No contention was made that the original transaction was not intended to be an outright transfer of title. In the instant case, however, the Government does urge that there has been no transfer of unencumbered title, and it is appellees who are challenging the validity of the transfer terms.

3. *Bona Fide Purchaser.* International's claim that it is a bona fide purchaser is wholly without basis in the record. The specific finding by the advisory jury, which the district judge incorporated into his findings of fact (R. 156), was that International did "have either knowledge or notice * * * that the plaintiff, United States of America, claimed restrictions upon the use or sale of the airplane in suit" at the time it advanced funds to the Finns, performed labor, and furnished materials (R. 115). These findings are amply supported in the record by testimony that it was generally understood in that industry that planes held by educational institutions were subject to these restrictions (R. 308-311, 663-65), that the documents

included in the CAA file reviewed by International's attorney gave notice of these restrictions (R. 622-23, Finns' Ex. K-2, K-4), and that at the time of its negotiations with the Finns, a different party (Vine-land) had possession of the plane (Intl. 5, R. 113, Intl. Ex. B, C, E, F, G). International relies upon the general finding by the district court that International made the loan and bestowed the labor and materials "in the ordinary course of its business believing in good faith that Defendants Finn were true and lawful owners of the aircraft" (R. 152). If, as International contends, these two findings are inconsistent, then the general finding as to good faith must yield to the particular finding as to notice or knowledge. However, we submit that there is no inconsistency since the finding relied upon by International merely attempted to restate somewhat more succinctly the jury's finding that International did "in good faith believe that Defendants Finn were the true and lawful owners of the airplane in suit" (R. 194) at the critical time. In other words, International had notice or knowledge of the Government's claims but honestly believed that these claims were insubstantial; however, in legal terms, this does not entitle International to the special protection accorded a bona fide purchaser.⁴

⁴ Recognizing the impossibility of being a bona fide purchaser at common law while having notice or knowledge of the Government's adverse claims, International argues that a special new rule was established by Section 25 of the Surplus Property Act. Under this alleged new rule, one can be a bona fide purchaser as long as he honestly believes that known adverse claims can be defeated. International's only basis for this statement is a quota-

4. *The Transfer Document.* Both International and Vineland argue that the only document which could be considered a bill of sale or transfer document is the Sales Receipt (Intl. Ex. A-1, reprinted in International's Appendix B). We submit, however, that neither the Sales Receipt nor any other document was the transfer paper for this plane. The Sales Receipt contains no words of transfer and does not attempt to set forth most of the conditions. It is precisely what it purports to be, *viz*, a receipt for money paid by Vineland. The fact that no transfer document was ever issued demonstrates that title was never transferred. The provisions of WAA Form 65, which are stated to apply to all subsequent transfers under this educational program (Par. 8, R. 16), establish the conditions of the transfer. Form 65 is not a transfer document, but it does establish the understanding of the parties as to the significance of the transfer of possession.⁵

tion from the defendant's brief in the *Jones* case. That statement was not accepted by this Court either expressly or impliedly, and certainly the mere fact that the court decides in favor of one party does not mean that the court has thereby adopted every statement appearing in a prevailing party's brief.

⁵ Appellees attempt to discredit some of the characterizations of the property interest transferred by the Government by claiming that equitable servitudes and determinable fees cannot be created for personal property. Not only does this contention overlook the fact that an agency established by Congress can dispose of property in any manner which it considers appropriate (see our main brief at p. 21), but it fails to consider the fact that the federal courts have recognized the applicability of these interests for personal property (see our main brief at p. 45). Thus, federal law, which governs this disposal of federal property, does recognize such property interests, and conflicting state rulings have no applicability.

5. *Damages.* At pp. 56–61 of its brief, Vineland argues at length that the Government could at most recover nominal damages for a breach of contract if the Government is not allowed to keep the plane, or for wrongful detention, if the Government's title is approved. Part of this claim is based upon Vineland's position that the plane was "commercially unsalable" at the time of its receipt from the Government; that argument is disposed of *supra*, p. 7. We urge that a decision as to the measure of the Government's damages need not be made by this Court and that this question can most appropriately be considered by the district court upon remand, since that court never had the occasion, in view of its disposition of the case, to make a finding on this question. We certainly do not accept Vineland's suggestion that the damages for breach would be nominal. If the Government does not recover the plane, Vineland's disregard for the terms of WAA Form 65 prevented the Government from having the plane used in the manner it had intended. Thus the Government should be entitled to recover a sum equal to the cost of placing an equivalent plane in a similar educational institution or using it as the Government otherwise desires. And if the Government is allowed to retain the plane, its damages for detention should be the rental cost for a similar plane during that period. This was the standard used by the district court to measure the damages owed by the Government; it should likewise be the measure of damages due to the Government.

CONCLUSION

For the foregoing reasons and those set out in our main brief, we respectfully submit that the judgment below dismissing the Government's complaint and awarding affirmative judgment against the United States on the Finns' counterclaim should be reversed.

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No. 14770

**In the United States Court of Appeals
for the Ninth Circuit**

UNITED STATES OF AMERICA, APPELLANT

v.

GEORGE C. FINN, CHARLES C. FINN, INTERNATIONAL
AIRPORTS, INC., A CORPORATION, PETER A. BANCROFT
AND VINELAND ELEMENTARY SCHOOL DISTRICT OF
KERN COUNTY, APPELLEES

AND

VINELAND ELEMENTARY SCHOOL DISTRICT OF KERN
COUNTY, CALIFORNIA, APPELLANT

v.

UNITED STATES OF AMERICA, GEORGE C. FINN, CHARLES
C. FINN, AND INTERNATIONAL AIRPORTS, INC.,
APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

FINAL BRIEF FOR THE UNITED STATES

FILED

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*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION*

FINAL BRIEF FOR THE UNITED STATES

We believe that the briefs previously filed by the Government adequately demonstrate that the decision below was erroneous. However, in view of the discussion at the oral argument, we wish to supplement the Government's briefs heretofore filed on two particular matters—i. e., (1) the validity of Form 65

and the restrictions on resale therein contained, and (2) the position that the Finns obtained through improper representations a Civil Aeronautics Administration certificate of registration which they thereafter used as proof that the restrictions had been removed.

I

Examination of all the applicable statutory provisions and regulations, rather than the limited parts thereof considered by the court below, clearly shows the fallacy of the rulings that Form 65 was invalid because inconsistent with the regulations and that the regulation which the court regarded as applicable was invalid because inconsistent with the Surplus Property Act ¹

The error in the Court's rulings stems from failure to consider all the relevant statutory provisions and regulations, and, in consequence, from reliance on certain provisions and regulations which are not in fact controlling.

For example, the Court lays great stress on the provision in Section 13 (a) (1) (A) of the statute that surplus appropriate for school use "may be sold or leased". On the assumption that Regulation 4 (C. F. R., 1946 Supp., Ch. XXIII, Part 8304, pages 5142, et seq.) is the only one implementing Section 13, the Court concludes that it unlawfully exceeds the authority of the statute in providing for any other method of disposition. (See Tr. 128-129; 133-134.) The fallacy of this reasoning stems from the Court's overlooking or ignoring Regulation 14 (C. F. R.,

¹ The Sixth Circuit's decision rests on and adds nothing to the reasoning of the court below. What is said herein is therefore applicable to both decisions. The first two divisions of the Finn's brief also re-assert Judge Mathes' reasoning.

1946 Supp., Ch. XXII, Part 8314, pp. 5227 et seq.) which is the one which primarily implements Section 13. It provides for the sale or lease of surplus to schools at 40 percent discounts. Regulation 4, on the other hand, is a special regulation dealing only with disposition of aeronautical property on a basis which was practically a donation since the "price" placed on airplanes covered only packing and handling charges and was not subject to the 40 percent discount applicable to other sales to schools. See last paragraph of "Instructions" in Vineland's Exhibit E.

Thus the Court imported into its reasoning language which was applicable to the general school disposal program rather than to the program here involved. The significance which the Court attached to a comparison of the wording of Section 13, (a) (1) (A) and Regulation 4 disappears when Regulation 14 is taken into consideration as part of the whole picture.

Another example of fallaciously incomplete scrutiny of the regulations is the Court's statement at Tr. 129 that, as of the date of the transfer to the school, a sale was the only permissible method of transfer. This provision in Section 8304.7 relates only to disposals for use as "transport aircraft" (cf. f. n. 27, p. 38 of Government's opening brief); whereas the transfer here involved was of an airplane falling into an entirely different category—namely, one which had been determined to be "commercially unsaleable" under Sections 8304.1 (b) (2), 8304.5 and 8304.10 (see second paragraph of Vineland's Exhibit E, and paragraph II of "Instructions" in that exhibit). Such airplanes were subject, under Section 13 (a) (2) (b)

of the Surplus Property Act and Regulations 8304.13 and 8304.11, to donation or other disposition to schools in the precise manner outlined in Vineland's Exhibit E and Form 65.

More significant even than either of the foregoing is the Court's failure to construe Section 8304.11 and the disposal program in the present case described in Vineland's Exhibit E in the light of Sections 8304.16, 8301.18, 8301.19, 8314.7, 8314.11 and 8314.12. All these Sections clearly provide that disposal agencies "shall establish procedures" for the disposition of the kinds of property committed to them, and shall file with the Administrator "copies of all their regulations, orders and instructions of general applicability."² When these procedures, regulations, orders and instructions are approved by the Administrator they become ~~equal~~ parts of the regulations of equal standing with the general provisions. There is no room therefore for an assertion that they are contrary to regulations simply because they were not set forth in detail in the general provisions. Not only is such flexibility inevitably necessary and therefore proper in the administration of such a vast program; it is clearly authorized by Sections 4, 9, 13 (a), 13 (b) and 15 of the statute.

Against this background, and with attention to all regulations rather than only the part considered be-

² War Assets Administration had dual functions. It was the agency established to supervise all disposition of surplus through "disposal agencies" designated by it for various kinds of property. It designated itself as the disposal agency of property not specifically assigned to certain named agencies, including aircraft. See Section 8301.2 (g) (5).

low, it is entirely clear and easily demonstrable that disposal of the airplane in question pursuant to the program described in Vineland's Exhibit E and Form 65 was authorized by the Administrator and was well within his powers under the regulations and the statute. There was an "Educational Aircraft Disposal Division" within the Administration (see Vineland Exhibit E). Specific testimony as to its official and lawful establishment is not necessary; that may be assumed. The Division determined that certain airplanes were "commercially unsaleable." (See the second paragraph of the Exhibit and paragraph II of the "Instructions.") It was the power and duty of the Division under Section 8304.10 to make that determination. The determination having been made, it was the duty of the Division, under Section 8304.11 (a), to compile a list of the items and to fix prices therefor reflecting the benefit that would accrue to the Government from their use by schools, and to submit the list to the Administrator. The Section provides that if the lists are approved by the Administrator they shall be published "by order hereunder"; and the Division would thereupon be authorized to dispose of the airplanes at such prices. Such an order was made. It was published in 11 F. R. 1471 on January 31, 1946, effective on February 5, 1946, as Order 4. The list which is part of the order includes the very type of airplane involved in this case.³ Order 4 was

³ It is listed in Order 4 under Catalog Number 42-2420 as a C-46 Curtiss-Wright Commando at the price of \$200. Precisely the same description and price appear in Vineland's Purchase Order of June 25, 1946, Vineland's Exhibit D.

continued "in full force and effect" in the preamble of Regulation 4 of May 21, 1946 (the one here involved) and the list which is part of the disposal program described in Vineland's Exhibit E again includes, under the same catalogue number and price, C-46 planes of the kind involved in the present case. Thus its disposition under Section 8304.11 (a) was specifically authorized.

Section 8304.11 further directs that the disposal agency "shall establish procedures" for the disposal of the listed airplanes to schools. It is clear that the letter, the instructions, the lists, and the accompanying form of purchase order and Form 65 making up Vineland's Exhibit E together constitute such "procedures." They obviously fall within the coverage of Section 8304.11 as "regulations, orders, or instructions of general applicability" to be submitted to the Administrator. In view of the presumption of regularity in the discharge of duties of public officers, and the fact that the documents describing the program and procedures (Vineland's Exhibit E) were mailed to schools throughout the country, it is entirely proper to conclude that it was approved by the Administrator. The discussion and references above show that such action on his part was well within his statutory authority and regulations.

There remains for consideration the error in the reasoning of the court below that Form 65 is invalid. The Court's conclusion rests in substantial degree on the fact that Section 3804.11 (b) requires an agreement of the school that the airplane "will not be flown except for purposes of research or experiment in con-

nection with the science of aeronautics," whereas Form 65 requires an agreement that the airplane "will not be used for any actual flight purposes" (Tr. 132-134). It was suggested below that this allegedly unauthorized and fatal variation was the result of using in Form 65 the wording of an earlier and "superseded" regulation (Tr. 133).

But examination of the "superseded regulation" referred to by the court at Tr. 133 shows that its wording is not the same as that of Form 65. The earlier regulation required an agreement that the airplane "will not be used for *any* flight purpose" (italics supplied). Apart from this error of the court below, consideration of the successive phrasings in the light of the known purposes of the educational airplane disposal program indicates that the variations are not material and that the significance given to them below is unwarranted. It is clear that the justification for transfer of airplanes to schools at nominal prices was to get the benefit of their use in education; and that resale by the schools at higher figures to persons who would use them in commercial flight would have frustrated the statutory objective of avoiding speculation in surplus. (See Section 2 (b) of the statute.) Hence, the initial prohibition against use for *any* flight purpose. The later wording of Section 3804.11 (b) was designed to carry on this basic purpose and at the same time to recognize the propriety of flight use by schools for the limited purpose of "research and experiment in connection with the science of aeronautics"—an educational as distinguished from a commercial use. The words in

Form 65 prohibiting use for “*actual* flight purposes” are readily susceptible to the same construction—i. e. prohibiting commercial use—and presumably were merely regarded as a better way of saying the same thing. The semantic argument of the court below is not forceful enough to justify overthrowing a large disposal program, particularly as it was clearly within the power of the Administrator, under the statutory and regulatory provisions referred to above, to have approved disposal procedures and general instructions or changes therein submitted to him from time to time by his operating officers.

This brings us to consideration of the conclusion of the court below (Tr. 133, 136) and of the Finn’s (Brief, pages 11, 12) that there was no restriction on the sale of the airplane after three years.

We see no reason why the restriction against sale within three years means anything more than just what it says, and expresses a desire to carefully supervise the operation of the school within that period, and to be alerted to situations where an airplane no longer needed by the initial recipient, but still useable for educational purposes, could be transferred to another school. Surely it would have been very easy to say straight forwardly that airplanes could be sold for any or every purpose after three years, if such had been the purpose. Obviously, however, that was not the intent or thinking of the Administration. The whole objective of the distribution of the airplanes on what was virtually a donation basis at nominal prices was to get and retain as long as possible the benefit of their use for educational purposes. Schools had to

qualify. They had to certify their need and to state the particular "non-flight" instructional or research or experimental use they had in mind. Actual (i. e., commercial) flight was prohibited. To permit resale for commercial use of airplanes still useable for the very purpose of their transfer flies so plainly in the face of the known objectives of the disposal program as to indicate the unsoundness of a conclusion authorizing such sales on the basis of the wording of the three year clause.

The propriety of continuing the use for educational purposes until the airplane is truly good for nothing but scrap is obviously proper; and the Administrator's approval of the disposal program submitted to him under Sections 3804.16 and 3804.11 is obviously within his powers and wholly lawful. It should be so declared and the contrary decision of the court below should be reversed.

II

The CAA registration which the Finns used as proof of official removal of the restrictions on sale of the airplane in suit to them was obtained by the use of false and misleading documents and improper procedures

George Finn was told in Washington about March 15, 1951, that the restrictions would not be waived (Tr. 361, 738, 743, 760, 761). He knew of the provision in the Civil Aeronautics Act of 1938 (Section 501 (f) of the statute, Act of June 23, 1938, c. 601, 52 Stat. 1006, as amended by 62 Stat. 494) which stated that registration was not proof of title (Tr. 483). Nevertheless he obtained registration improperly and then got possession of the plane from the school on the

representation that the registration established that the restrictions had been removed.

The technique of getting CAA registration of the plane in suit (serial number 3645), was first worked out in connection with the old plane (serial number 96563) referred to in the trial as the "hulk." On April 9, 1951 Finn presented to CAA a bill of sale from the school of the hulk on CAA form 500, dated March 28, 1951 (part of Plaintiffs' Exhibit 12), and a false affidavit of Peter Bancroft dated April 6, 1951 (International Exhibit U-4) to which were appended the "Sales Document" which is International Exhibit T, and the "Release of Custody" which is International Exhibit U-3. The statement in the affidavit that the hulk had been sold to Finn on March 28 was false. It had been sold on October 9, 1950, by the document which is Vineland Exhibit G. It is the plane which the Finns agreed to reconvey to the school under the terms of the agreement of February 28, 1951. See paragraph (1) of part III Vineland Exhibit B. The characterization of the Sales Document as an "invoice"—implying an unrestricted sale to the school—is improper since the hulk had been obtained, as all educational airplanes were obtained, upon the school's execution of Form 65 or its predecessor Form 35.

The purpose and scheme to obtain CAA registration on this kind of documentation is revealed by what occurred at the conference in Washington on April 4, 1941, which was attended by Mr. Howard of CAA. Finn showed photographs of the hulk, and said it was the plane he wanted to register (Tr. 447, 497). There

was discussion of the coverage of the provision in Form 65 which permitted sale as "scrap" (Tr. 495). The hulk shown in the photographs might well have been thought to fall into that category. Against this background it is easy to see how registration was obtained on the documents described above on April 11, 1951.

Having gotten registration of the hulk in this way, registration of the plane in suit was obtained by the presentation to CAA of a comparable set of misleading and false papers. On April 14, 1951, Mr. Bancroft executed an affidavit in the same general form as the previous one (Government's Exhibit 7; also part of International Exhibit A) which was false or misleading in various ways. As in the former instance, a "Sales Receipt" relating to the airplane was attached (see International Exhibit A) and referred to in a manner indicating it to be evidence of an outright sale; whereas Bancroft well knew that he had signed Form 65 as a condition precedent to getting the plane. This deception was compounded by the false statement that all other "records pertaining to" the plane had been destroyed by a fire on March 5, 1951; which statement is proven false by the school's introduction at the trial of its copy of the agreement with the Finns of February 28, 1951 (Vineland Exhibit B). The affidavit next falsely said that title was conveyed to the Finns on February 28, 1951, by the attached bill of sale on CAA form 500. That document was not signed until April 14, 1951, the same date as the affidavit. The use of the CAA form of Bill of Sale was prohibited by Part C-3 of the

CAA "Instructions for Registering an Aircraft" (International Exhibit M). Since the agreement of sale to the Finns of February 28, 1951, was clearly a "conditional sale contract" within the meaning of the instructions and the definition in the Civil Aeronautics Act (Section 1 (17) (18) of the Civil Aeronautics Act) the agreement of February 28, 1951, is what should have been submitted. If it had been submitted the certificate would have stated the interest of the school rather than an unqualified interest of the Finns. See Section 503 (1) (2) of the statute. But, as we have seen, its existence was negated by the false statement that it had been destroyed by fire.

So now we see how the Finns, after establishing with the **h**ulk the pattern of registration on a CAA form of Bill of Sale and a false affidavit of Bancroft, were able to accomplish by the same technique an improper registration of the plane in suit.

Their improper obtaining in this way of CAA registration, and their use of the registration to obtain physical possession of the plane, and thereafter their use of that possession and a false warranty of complete and unencumbered title to effect a \$15,000 mortgage of the plane to International, is conduct so shocking as to disentitle the Finns to any defense—let alone an affirmative recovery—at the hands of this court.

The Government briefs heretofore submitted on all other issues, including the legal effect of the restrictions (assuming them not to be invalid as declared by the court below), are reaffirmed.

The judgment below should be reversed.

Respectfully submitted.

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No. 14772

United States
Court of Appeals
for the Ninth Circuit

RICHARD C. LAMKIN and ANTHONY B.
SILVIA, Appellants,
vs.

BROWN AND ROOT, INC., PACIFIC BRIDGE
COMPANY, INC., MAXON CONSTRUCTION
COMPANY, INC., UTAH CONSTRUCTION
COMPANY, INC., and SWINERTON AND
WALLBERG, a co-partnership, Joint
Adventurers doing business under
the name of Brown-Pacific-Maxon, Appellees.

Transcript of Record

Appeal from the District Court of Guam, Territory of Guam

FILED

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United States
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In the District Court, Territory of Guam,
Marianas Islands

Civil No. 65-54

RICHARD C. LAMKIN and ANTHONY B.
SILVIA, on Behalf of Themselves and Others
Similarly Situated, Plaintiffs,

vs.

BROWN AND ROOT, INC., PACIFIC BRIDGE
COMPANY, INC., MAXON CONSTRUCTION
COMPANY, INC., UTAH CONSTRUCTION
COMPANY, INC., and SWINERTON & WALLBERG, a co-partnership,
Joint Adventurers Doing Business Under the
Name of Brown Pacific Maxon, Defendants.

COMPLAINT

Plaintiff Lamkin is a citizen of the State of Colorado and plaintiff Silvia is a citizen of the State of California, both temporarily employed within the unincorporated territory of Guam by defendants. Defendants are joint adventurers engaged in military construction work within the territory of Guam under contract to the military forces of the United States of America. This is a suit of a civil nature and is brought for the purpose of enjoining the defendants from obeying certain orders, directives and levies issued by employees, agents, servants and attorneys of the Government of Guam under claim of right and alleged color of law claimed to exist under the laws of the United States, particularly the Revenue Act of 1939 as

Amended, the Revenue Act of 1954 and the Organic Act of Guam, Chapter 8A, Title 48, U.S.C.A. as hereinafter fully appears.

First Count

Plaintiff Richard C. Lamkin for his claim alleges:

1. That he is employed by defendants pursuant to a contract of employment executed at Ft. Collins, State of Colorado in the month of December, 1952, which contract is still in full force and effect. Pursuant to the terms of said contract defendants employed plaintiff as an assistant mechanical superintendent to work on their project in the unincorporated territory of Guam and that plaintiff has fulfilled and performed and continues to fulfill and perform all of his obligations under the terms of said contract.

2. That plaintiff's gross income under said contract is One Hundred Eighty Four Dollars (\$184.00) per week, from which sum certain authorized deductions are made pursuant to the terms of said contract, leaving plaintiff a net balance of One Hundred Forty Two Dollars Fifty Four Cents (\$142.54) per week, and pursuant to the terms of said contract the net weekly balance of \$142.54 is to be paid to plaintiff each and every week during the continuance of his performance of said contract.

3. That contrary to and in violation of the terms of said contract defendants breached said contract

by failing and refusing to pay to plaintiff the net balance of his wages for the weeks ending September 26, 1954, October 3, 1954, October 10, 1954 and October 17, 1954, being a total of Five Hundred Seventy Three Dollars Sixteen Cents (\$573.16); that on the 27th day of October, 1954 plaintiff was paid the sum of Sixty Eight Dollars Ninety Cents (\$68.90) by defendants' check No. 14191 drawn on the Bank of California National Association of San Francisco, California, leaving a balance of Five Hundred Four Dollars Twenty Six Cents (\$504.26) due and unpaid to plaintiff.

4. That prior to the time the defendants failed to pay to plaintiff his wages as set out above, plaintiff received through the United States mail numerous demands purporting to be assessments of an income tax from one Harry L. Mangerich, claiming to be Commissioner of Revenue and Taxation for the Government of Guam, said demands being for the sum of Four Hundred Eighty Seven Dollars Fifty One Cents (\$487.51) plus interest.

5. That the defendants claim to justify their violation of the terms of their contract with plaintiff by asserting that levies had been made by the said Harry L. Mangerich on behalf of the Government of Guam upon the wages of plaintiff for said income tax alleged to be due to the Government of Guam; that said defendants further claim that the said Harry L. Mangerich asserts as his authority for said levies Sections 3640, 3670, 3690 and 3692, purported to be contained in Chapter 36 of an In-

ternal Revenue Code not otherwise identified; that said defendants state that the said Harry L. Mangerich claims his authority stems from Section 31 of the Organic Act of Guam and that said Section 31 incorporates the Internal Revenue Code of the United States into said Organic Act of Guam; that by the construction of the said Harry L. Mangerich and others, officers of the Government of Guam have the right to interpret, construe, administer and enforce said Internal Revenue Code of the United States.

6. That the purported levy by the said Harry L. Mangerich is not authorized by the Revenue Act of 1939 As Amended or the Revenue Act of 1954 of the United States or by any other statute of the United States.

7. That plaintiff is not indebted to the Government of Guam and did not and has not **authorized** defendants to pay any sums of money to the said Harry L. Mangerich or the Government of Guam on his behalf; that defendants are indebted to plaintiff in the sum of Five Hundred Four Dollars Twenty Six Cents (\$504.26), which sum defendants refuse to pay by reason of said purported assessment and levy.

Second Count

Plaintiff Anthony B. Silvia for his claim alleges:

1. That he is employed by defendants pursuant to a contract of employment executed at San Francisco, State of California, in the month of November, 1948, which contract is still in full force and

effect. Pursuant to the terms of said contract defendants employed plaintiff in a supervisory capacity to work on their project in the unincorporated territory of Guam and that plaintiff has fulfilled and performed and continues to fulfill and perform all of his obligations under the terms of said contract.

2. That plaintiff's gross income under said contract is One Hundred Forty Six Dollars Sixty Five Cents (\$146.65) per week, from which sum certain authorized deductions are made pursuant to the terms of said contract, leaving plaintiff a net balance of One Hundred Nine Dollars Sixty Five Cents (\$109.65) per week, and pursuant to the terms of said contract the net weekly balance of One Hundred Nine Dollars Sixty Five Cents (\$109.65) is to be paid to plaintiff each and every week during the continuance of his performance of said contract.

3. That plaintiff is informed and believes and therefore alleges the fact to be that defendants will, on the 3rd day of November, 1954, in violation of the terms and provisions of said contract of employment, confiscate the sum of One Hundred Nine Dollars Sixty Five Cents (\$109.65), being the net balance due to plaintiff after deductions from his wages for the preceding week, and further, that defendants will, on the 10th day of November, 1954, confiscate the sum of One Hundred Nine Dollars Sixty Five Cents (\$109.65), and further, that on the 17th day of November, 1954, an undetermined sum

will be confiscated from the wages of plaintiff by defendants.

4. That plaintiff is informed and believes and therefore alleges the fact to be that the defendants intend to pay such sums so confiscated from his wages to one Harry L. Mangerich, an employee of the Government of Guam, by reason of purported assessments and levies made by the said Harry L. Mangerich and served upon defendants.

5. That plaintiff is not indebted to the Government of Guam or the said Harry L. Mangerich or to the defendants herein in any amount.

6. That plaintiff has no adequate remedy at law to prevent the total confiscation and dissipation of his wages as set forth above.

7. That unless the defendants are restrained and enjoined from performing the acts of confiscation hereinabove described, plaintiff will be deprived of the fruits of his labor without due process of law.

Third Count

Plaintiffs Richard C. Lamkin and Anthony B. Silvia, on behalf of themselves and others similarly situated, for a further claim allege:

1. That defendants have, since the 1st day of January, 1951 to the present time withheld various sums of money from the wages of plaintiffs and other employees of defendants; and further, upon information and belief plaintiffs allege the fact to be that defendants will withhold such sums in the

future, said withholding being in accordance with the withholding tables provided in Section 1622 (a)-(d), (g)-(k) of the United States Revenue Act of 1939 As Amended and Section 3402 of the United States Revenue Act of 1954, said withholding not having been authorized by plaintiffs.

2. That said withholding hereinabove described was and is contrary to the provisions of Section 1621 of the United States Revenue Act of 1939 As Amended and Section 3401 of the United States Revenue Act of 1954.

3. That said Sections 1621 and 3401 as above described cannot be construed to authorize withholding from employees of defendants within a possession of the United States.

4. That by reason of the wrongful acts of defendants herein set out, plaintiffs and others have had substantial sums of money unlawfully withheld from their wages and that in the future, further substantial and undetermined sums will continue to be withheld from their wages contrary to the express provisions of the statutes herein set out.

5. That due to the numerous employees of defendants herein who have been subjected to the wrongful and illegal withholding hereinabove described, a multiplicity of suits to protect and secure their rights would be required and that therefore plaintiffs herein and others have no adequate remedy at law.

Wherefore:

Plaintiff Richard C. Lamkin demands:

1. Judgment against defendants for Five Hun-

dred Four Dollars Twenty Six Cents (\$504.26), together with interest at the rate of 6% per annum from the 26th day of September, 1954.

2. That defendants be restrained and enjoined from further confiscation of plaintiff's wages.

3. That defendants be restrained and enjoined from further withholding from the wages of plaintiff and others, and that said defendants be required to account for and repay to plaintiff and others such sums withheld from their wages since the 1st day of January, 1951.

4. Such other and further relief as to the Court may seem proper.

Plaintiff Anthony B. Silvia demands:

1. That defendants be restrained and enjoined from confiscating his wages as threatened.

2. That defendants be restrained and enjoined from further withholding from the wages of plaintiff and others, and that said defendants be required to account for and repay to plaintiff and others such sums withheld from their wages since the 1st day of January, 1951.

3. Such other and further relief as to the Court may seem proper.

Dated: This 27th day of October, 1954.

/s/ FINTON J. PHELAN, JR.,

/s/ E. R. CRAIN,

Attorneys for Plaintiffs

[Endorsed]: Filed October 28, 1954.

[Title of District Court and Cause.]

STIPULATION

Subject to the approval of the Court, it is hereby stipulated by and between E. R. Crain and Finton J. Phelan, Jr., Attorney for the Plaintiffs, and H. G. Homme, Jr., United States Attorney, appearing Specially as Attorney for the Defendants, may have to and including the 19th day of January, 1955, within which to answer, move or otherwise plead to the complaint on file herein.

/s/ E. R. CRAIN,

/s/ FINTON J. PHELAN, JR.,

Attorneys for Plaintiffs,

UNITED STATES OF

AMERICA

/s/ H. G. HOMME, JR.,

United States Attorney,

Attorney for Defendants

Approved:

/s/ PAUL D. SHRIVER,

Judge of the District Court of
Guam

[Endorsed]: Filed November 19, 1954.

[Title of District Court and Cause.]

STIPULATION

Subject to the approval of the Court, it is hereby stipulated by and between counsel for the Plaintiff and counsel for the United States of America, De-

fendant, that Defendant, United States of America may have to and including February 18, 1955, within which to answer, move or otherwise plead to the complaint on file herein.

/s/ E. R. CRAIN,

/s/ FINTON J. PHELAN, JR.,

Attorneys for Plaintiffs

UNITED STATES OF

AMERICA

/s/ By H. G. HOMME, JR.,

United States Attorney

Approved:

/s/ PAUL D. SHRIVER,

Judge of the District Court of

Guam

[Endorsed]: Filed January 19, 1955.

[Title of District Court and Cause.]

MOTION—12 (b) (6) F.R.C.P.

The defendants Brown and Root, Inc., Pacific Bridge Company, Inc., Maxon Construction Company, Inc., Utah Construction Company, Inc., and Swinnerton and Wallberg, a co-partnership, joint adventurers doing business under the name of Brown Pacific Maxon move the Court as follows:

1. To dismiss the action because the complaint fails to state a claim against the defendants upon which relief can be granted.

2. To enter Summary Judgment for the defendants on the ground that the complaint and affidavit

attached herewith show that there is no material question of fact before the Court and that the defendants are entitled to judgment as a matter of law.

Dated this 17th day of February, 1955.

/s/ H. G. HOMME, JR.,

United States Attorney,

Attorney for Defendants

AFFIDAVIT

United States of America,
Territory of Guam—ss.

J. Russell Marshall, being first duly sworn on oath, deposes, says and makes this Affidavit in support of a Motion to Dismiss and for Summary Judgment in the above-entitled proceedings as follows:

1. That he is a citizen of the United States having attained the age of maturity; and that he is a proper person to make this Affidavit, and; that he is presently employed within the Territory of Guam, United States of America.

2. That ever since April 1, 1954, he has been continuously so employed by certain joint adventurers doing business under the name of "Brown Pacific Maxon" and composed of the following corporations and co-partnership, to wit: Brown and Root, Inc., a Texas corporation; Pacific Bridge Company, a Delaware corporation; Maxon Construction Company, Inc., an Ohio corporation; Utah Construction Company, a Utah corporation, and: Swinnerton and Wallberg, a co-partnership; that at

all times hereinafter Affiant shall refer to said joint adventurers as the "employer" for the sake and purpose of clarity.

3. That during all times referred to herein the employer has maintained administrative and construction offices on certain military reservations in the Territory of Guam.

4. That Affiant is titled the "Project Manager" for the employer and as such is the due and lawful official authorized by and in charge of the management of the affairs of the employer within the Territory of Guam and that, therefore, Affiant has knowledge of the affairs of the employer.

5. That the sole, singular and exclusive activity of the employer within the Territory of Guam is the construction of military installations upon military reservations pursuant to a certain cost-plus-fixed-fee contract between the employer and the Department of the Navy and that such contract is the causa sine qua non of employer's existence.

6. That pursuant to the provisions of said contract the employer acquires all materials and labor necessary to such construction as purchasing and contracting agent for the Department of the Navy, at no time acquiring anything in its own name, title or behalf and, therefore, solely and exclusively performing an administrative service in these constructions activities on behalf of the Government of the United States.

7. That of thousands of persons employed for the purposes aforesaid, the employer on the 17th day of September, 1952, at Denver, Colorado, em-

ployed one Richard C. Lamkin, by then and there entering into the written contract of employment hereto attached as Exhibit "A" and that on the 24th day of January, 1953, the employer entered into a written modification of this original contract of employment with Richard C. Lamkin, a copy of which is hereto attached as Exhibit "B".

8. That pursuant to the provisions of the supplemental agreement the employer agreed to pay Richard C. Lamkin the minimum sum of Six Hundred Seventy-five (\$675.00) Dollars per month in monthly installments and has continuously thereafter so done.

9. That at all times during the aforesaid employment of Richard C. Lamkin the employer has regularly deducted income tax withholdings as provided by the United States Internal Revenue Codes and Regulations and has paid such sums withheld over to the Treasurer of the Government of Guam. A copy of "Employees' Withholding Exemption Certificate" executed by Richard C. Lamkin, dated November 20, 1952, is hereto attached as Exhibit "C".

10. That the employer has followed a like procedure covering Guam earnings in the instance of all other employees employed on Guam under the same or similar conditions.

11. That on the 1st day of September, 1950, the employer entered into a similar written contract of employment with one Anthony B. Silvia, a copy of which contract is attached as Exhibit "D", and that pursuant to such contract the employer has regu-

larly paid wages to Anthony B. Silvia and therefore has made regular deductions for income withholdings in the manner aforesaid. A copy of "Employees Withholding Exemption Certificate" executed by Anthony B. Silvia, dated December 15, 1950, is hereto attached as Exhibit "E".

12. That on the 30th day of September, 1954, employer was served with ninety-eight (98) Warrants for Distraint and Levies by the Commissioner of Revenue and Taxation for the Government of Guam contending that ninety-eight (98) of employer's employees were indebted to the Government of Guam in various amounts by reason of their failure to pay certain income taxes to such Government.

13. That accordingly and on the 30th day of September, 1954, a Warrant for Distraint and Levy covering the wages of Richard C. Lamkin was served upon the employer setting forth in the Warrant for Distraint that Richard C. Lamkin was indebted to the Government of Guam for unpaid taxes in the sum of \$487.51 together with interest in the amount of \$15.84 making a total in all of \$503.35 and that pursuant thereto the employer distrained the sum of \$142.54 from wages then due and owing to Richard C. Lamkin. A copy of such Warrant for Distraint and Levy is attached as Exhibit "F".

14. That on the 7th day of October, 1954, employer was served with a subsequent Levy by the Commissioner of Revenue and Taxation for the Government of Guam in the amount of \$361.22 and

pursuant to such Levy employer distrained the sum of \$145.54 from wages then due and owing the said Richard C. Lamkin. A copy of such Levy is attached as Exhibit "G".

15. That on the 14th day and the 22nd day of October, 1954, employer was served with two subsequent Levies in the amounts of \$215.93 each and pursuant to such Levies employer distrained the further sum of \$285.08 from wages due and owing Richard C. Lamkin. Copies of the foregoing Levies are attached as Exhibits "H" and "I" respectively.

16. That pursuant to the Warrant for Distrain and Levies above-described, employer has distrained the total sum of \$573.16 from the wages due and owing Richard C. Lamkin, from which sum employer has been authorized by the Commissioner of Revenue and Taxation for the Government of Guam to release the sum of \$68.90 and that therefore, employer has distrained and paid over to the Government of Guam the net sum of \$504.26 pursuant to the commands of said official and subsequent to the filing of this action.

17. That on the 18th day of November, 1954, being at a time subsequent to the filing of the instant action, employer was served with a Warrant for Distrain and Levy by the Commissioner of Revenue and Taxation for the Government of Guam setting forth that Anthony B. Silvia was indebted to the Government of Guam in the amount of \$213.06 for unpaid taxes and the amount of \$8.60 as interest making in all a total of \$221.66 and pursuant thereto the employer distrained the

sum of \$89.50 from wages then due and owing to Anthony B. Silvia. A copy of such Warrant for Distrainment and Levy is attached as Exhibit "J".

18. That on the 26th day of November, 1954, employer was served by a subsequent Levy by the Commissioner of Revenue and Taxation for the Government of Guam in the amount of \$132.31 and pursuant thereto employer distrained the sum of \$89.50 from the wages then due and owing Anthony B. Silvia. A copy of such Levy is attached as Exhibit "K".

19. That on the 2nd day of December, 1954, employer was again served with a Levy by the Commissioner of Revenue and Taxation for the Government of Guam in the amount of \$42.85 and pursuant thereto employer distrained the sum of \$42.85 from the wages then due and owing Anthony B. Silvia. A copy of such Levy is attached as Exhibit "L".

20. That pursuant to the Warrant for Distrainment and Levies above described the employer has distrained the total sum of \$221.85 from the wages of Anthony B. Silvia and has paid the said sum over to the Government of Guam pursuant to the commands of the official as aforesaid.

21. That pursuant to all other Warrants for Distrainment and Levies served upon the employer by the Commissioner of Revenue and Taxation for the Government of Guam, employer has distrained and paid over to the Government of Guam all sums the subject thereof.

22. That at all times aforesaid employer has been

advised and verily believes that its actions were lawful and in response to lawful authority and that it intends to continue to so act until such time as it shall be commanded by law to act otherwise.

23. That all Exhibits (being "A" through "L" inclusive) are true and exact copies of the original documents in the files of the employer.

Further Affiant sayeth not.

/s/ J. RUSSELL MARSHALL,
Project Manager, Brown Pacific
Maxon

Subscribed and sworn to before me this 11th day of February, 1955.

[Seal] /s/ ROLAND A GILLETTE,
Clerk of the District Court, Terri-
tory of Guam

EXHIBIT "A"

CONTRACT OF EMPLOYMENT (Hourly Employees - Manual)

Labor Contract No.....

Brown - Pacific - Maxon Guam Contractors NOy-13931, Contractors on U. S. Navy Contract NOy..., hereinafter called the Employer, employs the Employee named upon the following terms and conditions, to which the Employer and the Employee agree:

Name of Employee: Richard C. Lamkin.

Point of Hire: Denver, Colorado.

Exhibit "A"—(Continued)

Section 1. Assignment of Work:

(a) The position for which the Employee represents he is qualified and for which he is engaged is that of Machinist General Foreman, on Naval construction work at any of the islands or bases west of the 180th Meridian within or immediately adjacent to the Pacific Ocean Area, hereinafter called the Western Pacific Area.

(b) The place or places within the Western Pacific Area where the Employer may perform construction work is hereinafter called the site of the work. The Employee's initial assignment is at Guam, M. I., the location of the Employer's base of operations. However, if the Navy Department calls upon the Employer to perform work at any other points or places within the Western Pacific Area under the above Navy Contract or any other Navy cost-type contract which may be awarded subsequently to the Employer, this Employment Contract shall be fully applicable to all such work.

(c) With the written consent of the Employee, this agreement may be assigned to the United States or any of its agencies, or to any other Contractor engaged in the performance of a contract for the United States in said Western Pacific Area.

(d) The Contractor may require the Employee to render service in a classification of work other than that mentioned above, provided that the Employee's wage rate shall not be reduced below that provided in Section 3 of this agreement unless specifically agreed in writing between the Employer and the

Exhibit "A"—(Continued)

Employee in accordance with Section 13 of this agreement.

Section 2. Term of Agreement:

The term of this agreement shall be the period during which the Employer desires the services of the Employee in connection with Naval construction work in the Western Pacific Area (this period is hereinafter referred to as the "period of service"); provided, that at the time of completion of twelve (12) months of continuous service the Employee may terminate his employment hereunder; however, should the Employee continue his employment beyond twelve (12) months, the Employee may thereafter terminate his employment hereunder only by giving the Employer written notice specifying the date upon which he desires to terminate his employment, which date shall not be less than thirty (30) days after date of delivery of such notice to the Employer.

Section 3. Wages and Hours:

(a) Straight time compensation shall be at the rate of \$2.85* per hour. The Employee is guaranteed the opportunity to work a minimum of forty (40) hours each week, provided he is ready, willing and able to work.

(b) The Employee agrees to work such hours and shifts as may be required by the Employer. Any work performed in excess of eight (8) hours per day or in excess of forty (40) hours per week and

* Plus 10%.

Exhibit "A"—(Continued)

all work performed on designated holidays will be paid for at one and one-half times the straight time hourly rate. Designated holidays within the meaning of this contract shall be: New Year's Day, Washington's Birthday, Memorial Day, Fourth of July, Labor Day, Armistice Day, Thanksgiving Day and Christmas Day. Hours worked in excess of eight (8) hours in any one day shall not be used in computing the forty (40) hours per week for overtime purposes. Saturday and Sunday, as such, shall not be considered as overtime days. In computing the forty (40) hours per week for overtime purposes, hours within any scheduled work week for which the Employee is compensated as traveling time in accordance with paragraph 3(c) hereof shall be counted as hours worked.

(c) Compensation for traveling time will be paid while the Employee is en route on direction of the Employer from the point of hire to the site of the work, while en route on the return trip upon satisfactory completion of the period of service from the site of the work to the point of hire, and while awaiting transportation at the site of the work. Such travel time compensation shall be paid only for eight (8) hours in any twenty-four (24) hour period and for not more than the first forty (40) hours so computed in any seven (7) consecutive days, at the straight time rate. Travel pay shall not accrue during stopovers resulting from the Employee's voluntary action or disregard of the Employer's instructions, or during deviations made for

Exhibit "A"—(Continued)

the Employee's personal convenience. In the event a means of transportation other than that provided by the Employer is utilized by the Employee, compensation for traveling time will be computed on the basis of the most direct and rapid means of transportation available.

(d) The Employee will not be required to perform work within his trade or profession while traveling from point of hire to port of embarkation, while awaiting transportation at the port of embarkation, or upon the return trip while traveling from the port of debarkation to point of hire. The Employee may be called upon to perform minimum essential services incident to overseas travel from port of embarkation to the jobsite and on the return trip upon satisfactory completion of the period of service from the site of the work to the port of debarkation.

Section 4. Transportation and Traveling Expenses:

(a) Transportation: The Employer shall provide transportation from the point of hire to the site of the work, and upon satisfactory completion of the period of service, or upon impairment of health, as provided in Section 9(b) hereof, return to the point of hire. Transportation furnished by the Employer shall be by such method, class, schedule and route as the Employer may designate, except, however, that the Employer may approve variations in route or method of transportation for the convenience of the Employee, provided, however, that the total cost

Exhibit "A"—(Continued)

of transportation to the Employer shall not, in any event, exceed the cost of transportation which would have been incurred had the Employee been transported by the most direct and rapid means of travel available. If the Employer authorizes the Employee to furnish any part of his transportation, reimbursement will be made, within the limitations provided above, upon authorization by the Navy Officer in Charge of Construction and the presentation by the Employee of such evidence of expenditure as the Employer may require. The Employee agrees to accept transportation by such method, class, schedule and route as the Employer may designate. Failure on part of the Employee to utilize transportation as provided by or approved by the Employer will constitute release of the Employer from all further obligations for subsistence, transportation and travel pay.

(b) Subsistence En Route: The Employer will furnish subsistence without cost to the Employee, or in lieu thereof, the Employer will pay a subsistence allowance at the rate of six dollars (\$6.00) for each day during which the Employee is in travel status pursuant to Section 4(a). No subsistence allowance will be paid when subsistence is provided while traveling, or when subsistence and quarters are furnished during authorized stopovers, or during stopovers resulting from the Employee's voluntary action or disregard of the Employer's instructions. In computing subsistence allowance, days shall commence at midnight and for fractions of a

Exhibit "A"—(Continued)

day one-fourth ($\frac{1}{4}$) of the per diem allowance will be paid for each period of six (6) hours or fraction thereof. When quarters are furnished without meals, a subsistence allowance of five dollars (\$5.00) per day will be made.

(c) Baggage: Transportation of any personal baggage (exclusive of tools required by the Employer) in excess of the weight and size of that carried free by the carrier shall be paid by the Employee, unless written authorization to take excess personal baggage is given by the Employer.

Section 5. Jobsite Facilities:

Board, lodging, limited laundry service, medical services, and dental care of an emergency nature only, at the site of the work, will be furnished by the Employer at a charge not to exceed one dollar and fifty cents (\$1.50) per day. The Employee hereby authorizes the Employer to deduct all such charges, at the currently established rate, from any payment due the Employee hereunder.

Section 6. Medical Examinations:

The Employee, before departure, is to submit to the required physical examination and inoculations as designated by the Employer, and furnish the Employer, in duplicate, certificates of the examining physician and of the inoculations, it being expressly understood that satisfactory medical and inoculation certificates are conditions precedent to this employment. Provided, however, that the Employer may at its option, in the case of protracted series of inoculations, commence such series at the

Exhibit "A"—(Continued)

time of physical examination and conclude such series during the period of travel or upon arrival of the Employee at the site of the work. Such procedure shall not affect the requirement that satisfactory medical and inoculation certificates are a condition precedent to this employment. It is further understood that all statements made by the Employee in connection with said medical examination shall be deemed material to and a part of this contract and that any fraudulent misrepresentation or concealment of a material fact by the Employee in such statements shall relieve the Employer from any obligations under this contract. All approved or authorized incidental preliminary expenses, such as medical examination, inoculations, and photographs will be paid by the Employer.

Section 7. Compensation During Illness or Injury.

Compensation insurance benefits will be paid in accordance with the Longshoremen's and Harbor Workers' Compensation Act, as amended and extended by the Defense Base Act as the sole remedy for any injury or illness arising out of, or in the course of, employment under this agreement. However, if the Employee shall be unable to perform his duties under this contract by reason of injury or illness, and if such disability shall be determined to be compensable under the Act above-mentioned, then, upon such determination, the Employee shall be paid eight (8) hours for each regularly scheduled work day absent because of such

Exhibit "A"—(Continued)

disability during the first 7 day period up to a maximum of forty (40) hours. For the purpose of this section, any authorized holiday falling within such 7 day period will be regarded as a regularly scheduled work day. No other or further wages shall be paid to the Employee until he is able to and does resume the performance of his duties under this contract and the benefits under the said Act cease. If the Employee shall be unable to perform his duties by reason of a disability which is determined not to be compensable under said Act, then the Employee shall receive no pay from the date and time of disability until he is able to and does resume his duties under this contract.

Section 8. Employee's Reserve Fund:

(a) Beginning with the date the Employee leaves the port of embarkation the Employer shall withhold from each weekly payment due to the Employee an amount equal to one-third ($\frac{1}{3}$) of the Employee's gross weekly earnings or \$25.00, whichever figure is lower, until a reserve of \$350.00 shall have been set aside; provided, that if the Employee quits or is discharged, so as to become subject to the provisions of Section 9(c), then all monies due to the Employee at the time of such quitting or discharge shall be added to and become a part of said reserve.

(b) This reserve fund shall be retained during the Employee's entire period of service. Any monies owed by the Employee to the Employer at the time of termination of employment shall be chargeable

Exhibit "A"—(Continued)

to and collected from this reserve fund. Any part of the reserve fund not used as provided herein or as provided elsewhere in the contract shall be paid to the Employee immediately upon determination of the amount not so used or within thirty (30) days after the Employee leaves the Western Pacific Area, whichever period is shorter.

Section 9. Termination of Employment:

(a) If the Employee terminates his employment in accordance with the provisions of Section 2, then compensation for traveling time will be paid in accordance with Section 3(c) and transportation and travel expenses will be provided in accordance with Section 4.

(b) Should the health of the Employee become so impaired, through no fault of his own, during the period of service under this contract as to justify the Employer, in its opinion based upon such medical examination as the Employer and/or the Navy Department may demand, to repatriate the Employee, the Employee will be repatriated at the Employer's expense, as herein provided: The Employee's wages shall cease as of the time he is determined to be incapacitated; transportation and traveling expenses will be provided in accordance with Section 4; medical care during repatriation of the Employee as may be found necessary by such medical examinations as the Employer and/or the Navy Department may demand, will be provided at no cost to the Employee until he arrives at the

Exhibit "A"—(Continued)

point of hire or until he is delivered, for medical reasons, into the custody of legally responsible authorities, at which time all obligations of the Employer hereunder shall cease. The same conditions and provisions shall apply with reference to injuries arising out of and in the course of employment. The foregoing provisions shall not affect any rights which the Employee may have to compensation insurance under Section 7.

(c) If, prior to the completion of twelve (12) months of service hereunder, the Employee quits, or is discharged for cause, the employment shall terminate and all compensation and travel allowance shall cease as of the time of quitting or discharge, and the Employee thereafter shall be liable for and will pay or shall have deducted from his reserve fund his cost of living, including board, lodging, laundry, medical services and dental care, and his own return transportation cost and expenses. Termination for cause shall include but not be limited to the following: Lack of ability of the Employee to perform the work of the classification for which he is hired; carelessness or negligence of duties; insubordination; incompetence; failure or refusal to work; dishonesty; bad temper; failure to travel as scheduled by the Employer; the immoderate use of alcoholic drinks; the use of narcotics; any misrepresentation or concealment of material fact made for the purpose of securing this contract; failure to comply with the provisions of Section 10(c) of this contract; or any other act of misconduct; or upon

Exhibit "A"—(Continued)

request by the Navy Officer-in-Charge of Construction at the site of the work.

Section 10. Working Conditions:

(a) The Employee understands that other workers in his trade or other trades may be employed on the work to be done at the site of the work and that these men may be either union or non-union; and the Employee agrees that the employment of such men will not be used as a reason for failure to carry out this contract.

(b) The Employee understands that the various sites of the work are under the supervision of military authority. The Employee agrees that any act by the Employer inconsistent with the provisions hereof and any omission by the Employer to perform any of its obligations hereunder, shall be excused if such acts or omissions shall result from compliance by the Employer with any order or regulation of such military authority. The period of employment shall not be extended as a result of the interruption of the performance of this contract by reason of such orders or regulations, and the guaranteed opportunity to work for forty (40) hours per week while at the jobsite, as hereinabove provided, shall not be suspended.

(c) The Employee shall comply with all laws and regulations, both civil and military, applicable at the site of the work and the vicinity thereof, and such other rules and regulations as the Navy Officer-in-Charge of Construction and the Contractor

Exhibit "A"—(Continued)

may establish from time to time with respect to personnel employed. The Employee agrees to conduct himself at all times in an orderly manner with due regard for the convenience of his co-workers, and to conform to reasonable standards of personal cleanliness.

Section 11. Claims:

Any claims arising out of this contract or the employment under this contract, except claims of workmen's compensation as provided in Section 7 hereof, shall be submitted by the Employee by written notice to the Employer and to the Navy Officer-in-Charge of Construction at the site of the work. Such written notice shall set forth in detail the nature of the claim and the amount claimed by the Employee. Such written notice shall be given prior to the departure of the Employee from the site of the work. The giving of such written notice in the manner and at the time herein provided shall be a condition precedent to any right of action on any claim arising out of employment under this contract and any such right of action shall be limited to the matters set forth in said written notice. The Employer will furnish the Employee with an appropriate form on which such written notice may be given.

Section 12. Emergency Notification:

(a) In the event of emergency, accident or death, the Employer may notify: Esther Marie Lamkin, wife, at Station 1, Apt. 64, Agana, Guam. The

Exhibit "A"—(Continued)

above address may be considered as the Employee's permanent address, or the address of the person in whose care the Employer may communicate concerning this contract or other matters, if it is unable to communicate with the Employee.

(b) In the event of the death of the Employee while outside the continental limits of the United States during the period of service under this contract, the Employee authorizes the Employer to make appropriate disposition, as is deemed best by it under the prevailing circumstances, of the body and personal effects of the Employee. If so requested by the next of kin and approved by the Navy Officer-in-Charge of Construction, the body of the deceased Employee may be returned to the Employee's original point of hire at the Employer's expense.

Section 13. Certification by Employee:

The Employee hereby certifies that he has read the foregoing agreement and that he fully understands its terms and conditions; and the Employee further certifies that the foregoing terms and conditions constitute his entire agreement with the Employer and that no promises or understandings have been made other than those stated above; and it is specifically agreed that this agreement shall be subject to modification only by written instrument signed by both the employee and the employer.

Executed at Denver, Colorado, in quintuplet this 17th September, 52.

Exhibit "A"—(Continued)

—Effective date set forth in Modification of Contract Brown-Pacific-Maxon, Contract NOy-13931

Brown-Pacific-Maxon, Employer

Signed and Acknowledged in the presence of:
A. L. Roberson—As to the Employer.

/s/ Richard C. Lamkin, Employee

Signed and Acknowledged in the presence of:
Genevieve Eleman—As to the Employee.

EXHIBIT "B"

MODIFICATION OF CONTRACT OF
EMPLOYMENT

(To be used where "C" class employees are changed
to "A" class employees.)

Brown-Pacific-Maxon, contractors on U.S. Navy Contract NOy-13931, hereinafter called the employer, and Richard C. Lamkin, hereinafter called the employee, mutually agree to modification of Contract of Employment dated the 17th day of September, 1952, executed at Denver, Colorado.

Section 1. a. shall be modified to read: The position for which the employee represents he is qualified and for which he is engaged is that of Assistant Office Engineer, on Naval Construction work at any of the islands or bases west of the 180th Meridian within or immediately adjacent to the Pacific Ocean Area, hereinafter called the Western Pacific Area.

Exhibit "B"—(Continued)

Section 1. d. shall be modified to the effect that the wording "Section 13" on line six (6) shall be changed to read "Section 14".

Section 3. a. shall be modified to read: Compensation shall be at the rate of \$675.00 per month which shall constitute the entire compensation applicable for the entire period of service, unless otherwise agreed in writing between the Employer and the Employee. Such compensation shall begin on the 26th day of January, 1953, and shall cease on the date the Employee is returned to the point of hire, except as otherwise herein provided.

Section 3. b. shall be modified to read: The Employee agrees to work whatever hours are required for the performance of his work and position, it being understood that no overtime will be paid under any circumstances.

Section 3. c. shall be modified to read: Compensation for traveling time will be paid in accordance with Section 3. (a), except that travel pay shall not accrue during stopovers resulting from the Employee's voluntary action or disregard of the Employer's instructions, or during deviations made for the Employee's personal convenience. In the event a means of transportation other than that provided by the Employer is utilized by the Employee, compensation for traveling time will be computed on the basis of the most direct and rapid means of transportation available.

Section 4. a. shall be modified to the effect that

Exhibit "B"—(Continued)

transportation shall be provided as set forth in Section 10 (b).

Section 7. shall be modified to read: Compensation insurance benefits will be paid in accordance with the Longshoremen's and Harbor Worker's Compensation Act, as amended and extended by the Defense Base Act, as the sole remedy for any injury or illness arising out of, or in the course of, employment under this agreement. However, if the Employee shall be unable to perform his duties under this contract by reason of injury or illness, and if such disability shall be determined to be compensable under the Act, above-mentioned, then, upon such determination, the Employee shall be paid 1/26 of the monthly rate for each regularly scheduled work day absent because of such disability during the first 7 day period up to a maximum of 6/26 of the monthly rate. For the purpose of this section, any authorized holiday falling within such seven (7) day period will be regarded as a regularly scheduled work day. No other or further salary shall be paid to the Employee until he is able to and does resume the performance of his duties under this contract and the benefits under the said Act cease. If the Employee shall be unable to perform his duties by reason of a disability which is determined not to be compensable under said Act, then the Employee shall receive no pay from the date and time of disability until he is able to and does resume his duties under this contract.

Section 8. a. shall be modified to the effect that

Exhibit "B"—(Continued)

the wording, "Section 9 (c)" on line seven (7) shall be changed to read, "Section 10 (c)".

Section 9. shall be changed to read "Leave Privileges" instead of "Termination of Employment", and shall read: Employee hired in the Continental United States or the Territory of Hawaii and employed in the Western Pacific Area, shall accumulate leave at the rate of two (2) days per month up to a maximum accumulation of ninety (90) days, except that no leave shall be credited to the account of the Employee until he has either (1) performed six months of satisfactory service, under this contract, or (2) satisfactorily completed the period of service under this contract, or (3) been terminated because of impaired health, under the provisions of Section 10 (b), of this contract. Accumulation of leave will begin on the effective date of this Modification of Contract of Employment.

b. If, prior to the completion of twelve (12) months of service under this contract, the Employee quits or is discharged for cause, in accordance with Section 10 (c) below, all unused accrued leave will be forfeited.

c. Upon the completion of each year of service, under this contract, the Employee may elect either (1) to be paid for the value of the accumulated leave to his credit as of the end of such year, computed at the rate of compensation effective on the last day of that year, or (2) to continue to accumulate leave up to the maximum provided for in (a) above. Payment in cash for accumulated leave dur-

Exhibit B—(Continued)

ing the period of employment will be made only upon the approval of the Navy Officer-in-Charge of Construction.

Section 9. Termination of Employment, shall be changed to Section 10, and the wording in 10 (c) regarding provisions of Section 10 (c) shall be changed to read, "Section 11 (b)".

That the Contract of Employment between the parties hereto shall in all other respects remain in full force and effect in all of its provisions as provided therein.

Executed at Guam, M. I., this 24th day of Jan. 1953.

Brown-Pacific-Maxon

/s/ By H. Maxwell, Employer

Witness: Signed Viola Daniels.

/s/ Richard C. Lamkin, Employee

Witness: Signed Viola Daniels.

EXHIBIT "C"

Form W-4 (Rev. Nov. 1951) U. S. Treasury Department, Internal Revenue Service.

EMPLOYEE'S WITHHOLDING EXEMPTION
CERTIFICATE

Lamkin, Richard C., 923 Garfield Ave., Loveland,
Colorado. Social Security No. 490-09-2389.

How to Claim Your Withholding Exemptions

1. If Single, and you claim an exemption, write the figure "1"

2. If Married, one exemption is allowed for the husband and one exemption for the wife.

* * * * *

(b) if you claim one of these exemptions,
write the figure "1"..... x1

* * * * *

5. Add the number of exemptions which you have claimed above and write the total..... x1

I Certify that the number of withholding exemptions claimed on this certificate does not exceed the number to which I am entitled.

Date: November 20, 1952.

/s/ Richard C. Lamkin

EXHIBIT "D"

CONTRACT OF EMPLOYMENT

(Hourly Employees - Manual)

Labor Contract No.....

Brown-Pacific Maxon, Contractors on U. S. Navy Contract NOy-13931, hereinafter called the Employer, employs the Employee named upon the following terms and conditions, to which the Employer and the Employee agree:

Name of Employee: Silvia, Anthony B.

Point of Hire: Amesbury, Mass.

Section 1. Assignment of Work:

(a) The position for which the Employee represents he is qualified and for which he is engaged is that of Mechanic, H. E., on Naval construction work at any of the islands or bases west of the 180th Meridian within or immediately adjacent to

the Pacific Ocean Area, hereinafter called the Western Pacific Area.

[Printer's Note: The balance of this Exhibit is a duplicate of Exhibit "A" printed in full at pages 20 to 32 of this printed record, with the following exceptions:]

Section 3. Wages and Hours:

(a) Straight time compensation shall be at the rate of \$1.85 per hour. The Employee is guaranteed the opportunity to work a minimum of forty (40) hours each week, provided he is ready, willing and able to work.

* * * * *

Section 12. Emergency Notification:

(a) In the event of emergency, accident or death, the Employer may notify:

Charles E. Silvia, Son, at 3 Providence St., Springfield, Mass.

* * * * *

Executed at Guam, M. I., in quintuplet, this 1st day of Sept. 1950.

Brown Pacific Maxon, Employer
Signed and Acknowledged in the presence of:

(Signed) R. T. Carlson—As to the Employer.

/s/ Anthony B. Silvia, Employee
Signed and Acknowledged in the presence of:

(Signed) C. G. Gardones—As to the Employee.

[Attached Rider]

Original contract executed on 15 Nov. 1948 at Amesbury, Mass., and which date shall initiate

period of service. Modification of original contract executed on: None.

Initialed:

/s/ R. T. C. for Employer

/s/ Anthony B. Silvia, Employee

EXHIBIT "E"

Form W-4 (Revised October 1948) U. S. Treasury
Department, Internal Revenue Service.

EMPLOYEE'S WITHHOLDING EXEMPTION CERTIFICATE

(Collection of Income Tax at Source on Wages)

9353 Anthony B. Silvia, H-E Mechanic. Social
Security No. SS 018-09-7512.

File this form with your employer; otherwise he is
required by law to withhold tax from your
wages without exemption.

How to Claim Your Withholding Exemptions

1. If you are Single, write the figure "1"..... 1
2. If you are married, one exemption is allow-
ed for the husband and one exemption for
the wife.

* * * * *

(b) If you claim one of these exemptions,
write the figure "1"..... [1*]

* * * * *

5. Add the number of exemptions which you
have claimed above and write the total.... 1

I certify that the number of withholding exemp-

* Struck out.

tions claimed on this certificate does not exceed the number to which I am entitled.

Dated: Dec. 15th, 1950.

/s/ Anthony B. Silvia

EXHIBIT "F"

WARRANT FOR DISTRAINT

Richard C. Lamkin No. 52

Date	Debits	Credits	Unpaid Balance
1953			487.51

Date of Notice	Penalty of 5 percent.....	..
	Interest from.....to.....	15.84
	Total	503.35
	Additional Interest
	Total	503.35

Account number and Remarks

Government of Guam, Department of Finance

To: T. E. Fairbanks, Internal Revenue Agent.

Whereas, in pursuance of the provisions of the acts of Congress relating to Income Tax, the above-named person or persons is or are liable to pay the tax or taxes assessed against him or them, in the amount or amounts named above, together with penalties and interest prescribed by law for failure to pay said tax or taxes when the same became due: And Whereas, 10 days have elapsed since notice served and demand made upon said person or persons for payment of said tax or taxes; And Where-

as, said person or persons still neglect or refuse to pay the same: You are hereby commanded to levy upon, by distraint, and to sell so much of the goods, chattels, effects, or other property or rights to property, including stocks, securities, and evidences of debts, of the person or persons liable as aforesaid, or on which a lien exists for the tax or taxes, as may be necessary to satisfy the tax or taxes, with such additional amounts, including interest, as are shown in the statement above, and also such further sum as shall be sufficient for the fees, costs, and expenses of the levy: but if sufficient goods, chattels, or effects are not found, then you are hereby commanded to seize and sell in the manner prescribed by law so much of the real estate of said person or persons; or on which a lien exists for the tax or taxes, as may be necessary for the purposes aforesaid. You will do all things necessary to be done in the premises and strictly comply with all requirements of law, and for so doing this shall be your warrant, of which make due return to me at this office on or before the sixtieth day after the execution hereof.

Dated at Agana, Guam, this 29th day of September, 1954.

/s/ Harry L. Mangerich,
Commissioner of Revenue and
Taxation

LEVY

Government of Guam, Department of Finance

To: Brown-Pacific-Maxon Company, at Station No.
1, Box No. 2, Agana, Guam:

You are hereby notified that there is now due, owing and unpaid from Richard C. Lamkin, Station 1, Apt. B-64, Agana, Guam, to the Government of Guam the sum of Five Hundred Three and 35/100 dollars (\$503.35) as and for an income tax.

You are further notified that all property, rights to property, moneys, credits and/or bank deposits now in your possession and belonging to the aforesaid taxpayer and all sums of money owing from you to the said taxpayer are hereby seized and levied upon for the payment of the aforesaid tax, together with penalties and interest, and demand is hereby made upon you for the amount necessary to satisfy the liability set forth above from the amount now owing from you to the said taxpayer, or for such lesser sum as you may be indebted to him, to be applied in payment of the said tax liability.

Dated at Agana, Guam, this 29th day of September, 1954.

/s/ Harry L. Mangerich,

Commissioner of Revenue and
Taxation

EXHIBIT "G"

WARRANT FOR DISTRAINT

Richard C. Lamkin No. 128

Date	Debits	Credits	Unpaid Balance
1953			360.81
Date of Notice	Penalty of 5 percent.....		..
	Interest fromto.....		.41
	Total		361.22
	Additional Interest
	Total		361.22

Account Number and Remarks

Government of Guam, Department of Finance

To: Patrick M. Rice, Internal Revenue Agent:

Whereas, in pursuance of the provisions of the acts of Congress relating to Income Tax, the above-named person or persons is or are liable to pay the tax or taxes assessed against him or them, in the amount or amounts named above, together with penalties and interest prescribed by law for failure to pay said tax or taxes when the same became due: And Whereas, 10 days have elapsed since notice served and demand made upon said person or persons for payment of said tax or taxes; And Whereas, said person or persons still neglect or refuse to pay the same: You are hereby commanded to levy upon, by distraint, and to sell so much of the goods, chattels, effects, or other property or rights to property, including stocks, securities, and evidences of debts, of the person or persons liable as aforesaid, or on which a lien exists for the tax or taxes, as may be necessary to satisfy the tax or taxes, with

such additional amounts, including interest, as are shown in the statement above, and also such further sum as shall be sufficient for the fees, costs, and expenses of the levy; but if sufficient goods, chattels, or effects are not found, then you are hereby commanded to seize and sell in the manner prescribed by law so much of the real estate of said person or persons; or on which a lien exists for the tax or taxes, as may be necessary for the purposes aforesaid. You will do all things necessary to be done in the premises and strictly comply with all requirements of law, and for so doing this shall be your warrant, of which make due return to me at this office on or before the sixtieth day after the execution hereof.

Dated at Agana, Guam, this 6 day of October, 1954.

/s/ Harry L. Mangerich,
Commissioner of Revenue and
Taxation

LEVY

128

Government of Guam, Department of Finance

To: Brown-Pacific-Maxon Company at Station No.
1, Box No. 2, Agana, Guam:

You are hereby notified that there is now due, owing and unpaid from Richard C. Lamkin, Station 1, Apt. B-64, Agana, Guam, to the Government of Guam the sum of Three Hundred Sixty One and 22/100 dollars (\$361.22) as and for an income tax.

You are further notified that all property, rights to property, moneys, credits and/or bank deposits now in your possession and belonging to the aforesaid taxpayer and all sums of money owing from you to the said taxpayer are hereby seized and levied upon for the payment of the aforesaid tax, together with penalties and interest, and demand is hereby made upon you for the amount necessary to satisfy the liability set forth above from the amount now owing from you to the said taxpayer, or for such lesser sum as you may be indebted to him, to be applied in payment of the said tax liability.

Dated at Agana, Guam, this 6 day of October, 1954.

/s/ Harry L. Mangerich,

Commissioner of Revenue and
Taxation

EXHIBIT "H"

LEVY

Government of Guam, Department of Finance

To: Brown Pacific Maxon Company at Station No.
1, Box No. 2, Agana, Guam:

You are hereby notified that there is now due, owing and unpaid from Richard C. Lamkin, Station No. 1, Apt. B-64, Agana, Guam, to the Government of Guam the sum of Two Hundred Fifteen and 93/100 dollars (\$215.93) as and for an income tax.

You are further notified that all property, rights

to property, moneys, credits and/or bank deposits now in your possession and belonging to the aforesaid taxpayer and all sums of money owing from you to the said taxpayer are hereby seized and levied upon for the payment of the aforesaid tax, together with penalties and interest, and demand is hereby made upon you for the amount necessary to satisfy the liability set forth above from the amount now owing from you to the said taxpayer, or for such lesser sum as you may be indebted to him, to be applied in payment of the said tax liability.

Dated at Agana, Guam, this 14th day of October, 1954.

/s/ Harry L. Mangerich,
Commissioner of Revenue and
Taxation

EXHIBIT "I"

LEVY

Government of Guam, Department of Finance

To: Brown Pacific Maxon Company at Station No. 1, Box No. 2, Agana, Guam:

You are hereby notified that there is now due, owing and unpaid from Richard C. Lamkin, Station No. 1, Apt. B-64, Agana, Guam, to the Government of Guam the sum of Two Hundred Fifteen and 93/100 dollars (\$215.93) as and for an income tax.

You are further notified that all property, rights to property, moneys, credits and/or bank deposits

now in your possession and belonging to the aforesaid taxpayer and all sums of money owing from you to the said taxpayer are hereby seized and levied upon for the payment of the aforesaid tax, together with penalties and interest, and demand is hereby made upon you for the amount necessary to satisfy the liability set forth above from the amount now owing from you to the said taxpayer, or for such lesser sum as you may be indebted to him, to be applied in payment of the said tax liability.

Dated at Agana, Guam, this 21st day of October, 1954.

/s/ Harry L. Mangerich,
Commissioner of Revenue and
Taxation

EXHIBIT "J"

WARRANT FOR DISTRAINT

Anthony B. Silvia				No.....
	Date	Debits	Credits	Unpaid Balance
1951	5/14/54	\$213.06	-o-	\$213.06
Date of Notice		Penalty of 5 percent..... ..		
		Interest from 3/15/54 to		
		November 10, 1954 8.35		
		Total 221.41		
		Additional Interest25		
		Total 221.66		
Account Number and Remarks				

Government of Guam, Department of Finance

To: Patrick M. Rice, Internal Revenue Agent:

Whereas, in pursuance of the provisions of the acts of Congress relating to Income Tax, the above-named person or persons is or are liable to pay the tax or taxes assessed against him or them, in the amount or amounts named above, together with penalties and interest prescribed by law for failure to pay said tax or taxes when the same became due: And Whereas, 10 days have elapsed since notice served and demand made upon said person or persons for payment of said tax or taxes; And Whereas, said person or persons still neglect or refuse to pay the same: You are hereby commanded to levy upon, by distraint, and to sell so much of the goods, chattels, effects, or other property or rights to property, including stocks, securities, and evidences of debts, of the person or persons liable as aforesaid, or on which a lien exists for the tax or taxes, as may be necessary to satisfy the tax or taxes, with such additional amounts, including interest, as are shown in the statement above, and also such further sum as shall be sufficient for the fees, costs, and expenses of the levy; but if sufficient goods, chattels, or effects are not found, then you are hereby commanded to seize and sell in the manner prescribed by law so much of the real estate of said person or persons; or on which a lien exists for the tax or taxes, as may be necessary for the purposes aforesaid. You will do all things necessary to be done in the premises and strictly comply with all require-

ments of law, and for so doing this shall be your warrant, of which make due return to me at this office on or before the sixtieth day after the execution hereof.

Dated at Agana, Guam, this 18th day of November, 1954.

/s/ Harry L. Mangerich,
Commissioner of Revenue and
Taxation

LEVY

Government of Guam, Department of Finance

To: Brown Pacific Maxon Company at Station No.
1, Box No. 2, Agana, Guam:

You are hereby notified that there is now due, owing and unpaid from Anthony B. Silva, Station No. 1, Box 1332, Agana, Guam, to the Government of Guam the sum of Two Hundred Twenty-One and 66/100 dollars (\$221.66) as and for an income tax.

You are further notified that all property, rights to property, moneys, credits and/or bank deposits now in your possession and belonging to the aforesaid taxpayer and all sums of money owing from you to the said taxpayer are hereby seized and levied upon for the payment of the aforesaid tax, together with penalties and interest, and demand is hereby made upon you for the amount necessary to satisfy the liability set forth above from the amount now owing from you to the said taxpayer, or for such lesser sum as you may be indebted to

him, to be applied in payment of the said tax liability.

Dated at Agana, Guam, this 18th day of November, 1954.

/s/ Harry L. Mangerich,
Commissioner of Revenue and
Taxation

EXHIBIT "K"

LEVY

Government of Guam, Department of Finance

To: Brown Pacific Maxon Company at Station No.
1, Box No. 2, Agana, Guam:

You are hereby notified that there is now due, owing and unpaid from Anthony B. Silva, Station No. 1, Box 1332, Agana, Guam, to the Government of Guam the sum of One Hundred Thirty-Two and 31/100 dollars (\$132.31) as and for an income tax.

You are further notified that all property, rights to property, moneys, credits and/or bank deposits now in your possession and belonging to the aforesaid taxpayer and all sums of money owing from you to the said taxpayer are hereby seized and levied upon for the payment of the aforesaid tax, together with penalties and interest, and demand is hereby made upon you for the amount necessary to satisfy the liability set forth above from the amount now owing from you to the said taxpayer, or for such lesser sum as you may be indebted to

him, to be applied in payment of the said tax liability.

Dated at Agana, Guam, this 26th day of November, 1954.

/s/ Harry L. Mangerich,
Commissioner of Revenue and
Taxation

EXHIBIT "L"

LEVY

4th Issue 104

Government of Guam, Department of Finance

To: Brown Pacific Maxon Company at Station No.
1, Box No. 2, Agana, Guam:

You are hereby notified that there is now due, owing and unpaid from Anthony B. Silvia, to the Government of Guam the sum of Forty-Two and 85/100 dollars (\$42.85) as and for an income tax.

You are further notified that all property, rights to property, moneys, credits and/or bank deposits now in your possession and belonging to the aforesaid taxpayer and all sums of money owing from you to the said taxpayer are hereby seized and levied upon for the payment of the aforesaid tax, together with penalties and interest, and demand is hereby made upon you for the amount necessary to satisfy the liability set forth above from the amount now owing from you to the said taxpayer, or for such lesser sum as you may be indebted to

him, to be applied in payment of the said tax liability.

Dated at Agana, Guam, this 2nd day of December, 1954.

/s/ Harry L. Mangerich,
Commissioner of Revenue and
Taxation

[Endorsed]: Filed February 17, 1955.

[Title of District Court and Cause.]

NOTICE OF MOTION
12 (b) (6) F.R.C.P.

To: E. R. Crain and Finton J. Phelan, Jr., Attorneys for Plaintiff:

Please take notice, that the undersigned will bring the attached motion on for hearing before this Court at the Guam Congress Building, Agana, Guam, on the 4th day of March, 1955, at 9:30 o'clock a.m. or as soon thereafter as counsel can be heard.

/s/ H. G. HOMME, JR.,
United States Attorney,
Attorney for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed February 17, 1955.

[Title of District Court and Cause.]

AMENDED COMPLAINT

Plaintiff Lamkin is a citizen of the State of Colorado and plaintiff Silvia is a citizen of the State of California, both temporarily employed within the unincorporated territory of Guam by defendants. Defendants are joint adventurers engaged in military construction work within the territory of Guam under contract to the military forces of the United States of America. This is a suit of a civil nature and is brought for the purpose of enjoining the defendants from obeying certain orders, directives and levies issued by employees, agents, servants and attorneys of the Government of Guam under claim of right and alleged color of law claimed to exist under the laws of the United States, particularly the Revenue Act of 1939 as Amended, the Revenue Act of 1954, the Organic Act of Guam, Chapter 8A, Title 48, U.S.C.A. and for damages for injuries to plaintiffs by reason of deprivation by defendants of plaintiffs' civil rights in violation of the provisions of Chapter 21, Title 42, U.S.C.A., as hereinafter fully appears.

First Count

Plaintiff Richard C. Lamkin for his claim alleges:

1. That he is employed by defendants pursuant to a contract of employment executed at Denver, State of Colorado on the 17th day of September, 1952, which contract is still in full force and effect.

Pursuant to the terms of said contract defendants employed plaintiff as a machinist general foreman to work on their project in the unincorporated territory of Guam, which contract was modified effective the 26th day of January, 1953 to read that plaintiff was employed as an assistant office engineer at a salary of Six Hundred Seventy Five Dollars (\$675.00) per month, and that plaintiff has fulfilled and performed and continues to fulfill and perform all of his obligations under the terms of said contract.

2. That plaintiff's gross income under said contract is now One Hundred Eighty Four Dollars (\$184.00) per week, from which sum certain authorized deductions are made pursuant to the terms of said contract, leaving plaintiff a net balance of One Hundred Forty Two Dollars Fifty Four Cents (\$142.54) per week, and pursuant to the terms of said contract the net weekly balance of \$142.54 is to be paid to plaintiff each and every week during the continuance of his performance of said contract.

3. That contrary to and in violation of the terms of said contract defendants breached said contract by failing and refusing to pay to plaintiff the net balance of his wages for the weeks ending September 26, 1954, October 3, 1954, October 10, 1954 and October 17, 1954, being a total of Five Hundred Seventy Three Dollars Sixteen Cents (\$573.16); that on the 27th day of October, 1954 plaintiff was paid the sum of Sixty Eight Dollars Ninety Cents (\$68.90) by defendants' check No. 14191 drawn on

the Bank of California National Association of San Francisco, California, leaving a balance of Five Hundred Four Dollars Twenty Six Cents (\$504.26) due and unpaid to plaintiff.

4. That prior to the time the defendants failed to pay to plaintiff his wages as set out above, plaintiff received through the United States mail numerous demands purporting to be assessments of an income tax from one Harry L. Mangerich, claiming to be Commissioner of Revenue and Taxation for the Government of Guam, said demands being for the sum of Four Hundred Eighty Seven Dollars Fifty One Cents (\$487.51) plus interest.

5. That the defendants claim to justify their violation of the terms of their contract with plaintiff by asserting that levies had been made by the said Harry L. Mangerich on behalf of the Government of Guam upon the wages of plaintiff for said income tax alleged to be due to the Government of Guam; that said defendants further claim that the said Harry L. Mangerich asserts as his authority for said levies Sections 3640, 3670, 3690 and 3692, purported to be contained in Chapter 36 of an Internal Revenue Code not otherwise identified; that said defendants state that the said Harry L. Mangerich claims his authority stems from Section 31 of the Organic Act of Guam and that said Section 31 incorporates the Internal Revenue Code of the United States into said Organic Act of Guam; that by the construction of the said Harry L. Mangerich and others, officers of the Government of Guam, have the right to interpret, construe, administer

and enforce said Internal Revenue Code of the United States.

6. That the purported levy by the said Harry L. Mangerich is not authorized by the Revenue Act of 1939 As Amended or the Revenue Act of 1954 of the United States or by any other statute of the United States.

7. That plaintiff is not indebted to the Government of Guam and did not and has not authorized defendants to pay any sums of money to the said Harry L. Mangerich or the Government of Guam on his behalf; that defendants are indebted to plaintiff in the sum of Five Hundred Four Dollars Twenty Six Cents (\$504.26), which sum defendants refuse to pay by reason of said purported assessment and levy.

Second Count

Plaintiff Anthony B. Silvia for his claim alleges:

1. That he is employed by defendants pursuant to a contract of employment executed at Amesbury, State of Massachusetts, on the 15th day of November, 1948, which contract is still in full force and effect. Pursuant to the terms of said contract defendants employed plaintiff in a supervisory capacity to work on their project in the unincorporated territory of Guam and that plaintiff has fulfilled and performed and continues to fulfill and perform all of his obligations under the terms of said contract.

2. That plaintiff's gross income under said contract is One Hundred Forty Six Dollars Sixty Five Cents (\$146.65) per week, from which sum certain

authorized deductions are made pursuant to the terms of said contract, leaving plaintiff a net balance of One Hundred Nine Dollars Sixty Five Cents (\$109.65) per week, and pursuant to the terms of said contract the net weekly balance of One Hundred Nine Dollars Sixty Five Cents (\$109.65) is to be paid to plaintiff each and every week during the continuance of his performance of said contract.

3. That plaintiff is informed and believes and therefore alleges the fact to be that defendants will, on the 3rd day of November, 1954, in violation of the terms and provisions of said contract of employment, confiscate the sum of One Hundred Nine Dollars Sixty Five Cents (\$109.65), being the net balance due to plaintiff after deductions from his wages for the preceding week, and further, that defendants will, on the 10th day of November, 1954, confiscate the sum of One Hundred Nine Dollars Sixty Five Cents (\$109.65), and further, that on the 17th day of November, 1954, an undetermined sum will be confiscated from the wages of plaintiff by defendants.

4. That plaintiff is informed and believes and therefore alleges the fact to be that the defendants intend to pay such sums so confiscated from his wages to one Harry L. Mangerich, an employee of the Government of Guam, by reason of purported assessments and levies made by the said Harry L. Mangerich and served upon defendants.

5. That plaintiff is not indebted to the Govern-

ment of Guam or the said Harry L. Mangerich or to the defendants herein in any amount.

6. That plaintiff has no adequate remedy at law to prevent the total confiscation and dissipation of his wages as set forth above.

7. That unless the defendants are restrained and enjoined from performing the acts of confiscation hereinabove described, plaintiff will be deprived of the fruits of his labor without due process of law.

Third Count

Plaintiffs Richard C. Lamkin and Anthony B. Silvia, on behalf of themselves and others similarly situated, for a further claim allege:

1. That defendants have, since the 1st day of January, 1951 to the present time withheld various sums of money from the wages of plaintiffs and other employees of defendants; and further, upon information and belief plaintiffs allege the fact to be that defendants will withhold such sums in the future, said withholding being in accordance with the withholding tables provided in Section 1622 (a)-(d), (g)-(k) of the United States Revenue Act of 1939 As Amended and Section 3402 of the United States Revenue Act of 1954, said withholding not having been authorized by plaintiffs except for taxes to be withheld and paid to the United States of America.

2. That said withholding hereinabove described was and is contrary to the provisions of Section 1621 of the United States Revenue Act of 1939 As

Amended and Section 3401 of the United States Revenue Act of 1954.

3. That said Sections 1621 and 3401 as above described cannot be construed to authorize withholding from employees of defendants within a possession of the United States.

4. That by reason of the wrongful acts of defendants herein set out, plaintiffs and others have had substantial sums of money unlawfully withheld from their wages and that in the future, further substantial and undetermined sums will continue to be withheld from their wages contrary to the express provisions of the statutes herein set out.

5. That due to the numerous employees of defendants herein who have been subjected to the wrongful and illegal withholding hereinabove described, a multiplicity of suits to protect and secure their rights would be required and that therefore plaintiffs herein and others have no adequate remedy at law.

Fourth Count

Plaintiffs Richard C. Lamkin and Anthony B. Silvia, for themselves and others similarly situated, for a fourth count allege:

1. Reallege all of the allegations of the first and third counts of this complaint as though set forth herein in full.

2. That defendants, conspiring with one Harry L. Mangerich, who claims to be a duly appointed Commissioner of Revenue and Taxation of the unincorporated territory of Guam, and other officials of the Government of Guam unknown to plaintiffs,

did wilfully deprive plaintiffs and others of a civil right guaranteed to them by the Constitution and laws of the United States of America and the Organic Act of Guam, to wit: their property has been confiscated without due process of law contrary to the express provisions of Title 26, U.S.C.A.; that defendants, acting in concert with the said Harry L. Mangerich and others, under color of statutory law and regulations of the United States of America and the unincorporated territory of Guam, did deprive plaintiffs and others of their property and right to property as hereinbefore alleged, to the damage of each plaintiff in the sum of Twenty Five Thousand Dollars (\$25,000.00).

Wherefore, plaintiff Richard C. Lamkin demands:

1. Judgment against defendants for Five Hundred Four Dollars Twenty Six Cents (\$504.26), together with interest at the rate of 6% per annum from the 26th day of September, 1954.
2. That defendants be restrained and enjoined from further confiscation of plaintiff's wages.
3. That defendants be restrained and enjoined from further withholding from the wages of plaintiff and others, and that said defendants be required to account for and repay to plaintiff and others such sums withheld from their wages since the 1st day of January, 1951.

4. Judgment for Twenty Five Thousand Dollars (\$25,000.00).

5. Such other and further relief as to the Court may seem proper.

Plaintiff Anthony B. Silvia demands:

1. That defendants be restrained and enjoined from confiscating his wages as threatened.

2. That defendants be restrained and enjoined from further withholding from the wages of plaintiff and others, and that said defendants be required to account for and repay to plaintiff and others such sums withheld from their wages since the 1st day of January, 1951.

3. Judgment for Twenty Five Thousand Dollars (\$25,000.00).

4. Such other and further relief as to the Court may seem proper.

Dated this 3rd day of March, 1955.

/s/ FINTON J. PHELAN, JR.,

/s/ E. R. CRAIN,

Attorney for Plaintiffs

[Endorsed]: Filed March 3, 1955.

In the District Court of Guam for the Territory
of Guam

Civil No. 65-54

RICHARD C. LAMKIN, et al., Plaintiffs,

vs.

BROWN AND ROOT, INC., et al., Defendants.

SUMMARY JUDGMENT

F.R.C.P. 56 (c)

The motion of the defendants for summary judgment pursuant to Rule 56 (c) of the Rules of Civil Procedure, having been presented and the Court being duly advised,

The Court finds that the defendants are entitled to a summary judgment as a matter of law.

It is therefore ordered, adjudged and decreed that the defendants' motion for summary judgment be, and the same hereby is granted, that the plaintiffs' have and recover nothing by their suit.

Dated this 15 day of March, 1955.

/s/ PAUL D. SHRIVER,

Judge of the District Court

Approved as to form:

/s/ E. R. CRAIN,

/s/ FINTON J. PHELAN, JR.,

Attorneys for Plaintiffs

[Endorsed]: Filed March 15, 1955.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

We, the undersigned, jointly and severally acknowledge that we and our personal representatives are bound to pay to Brown and Root, Inc., Pacific Bridge Company, Inc., Maxon Construction Company, Inc., Utah Construction Company, Inc., and Swinnerton and Wallberg, a co-partnership, Joint Adventurers Doing Business Under the Name of Brown Pacific Maxon, defendants, the sum of Two Hundred Fifty Dollars (\$250.00).

The condition of this bond is that, whereas the plaintiffs have appealed to the Court of Appeals for the Ninth Circuit by notice of appeal filed 13th day of April, 1955, from the order of the District Court of Guam dismissing the complaint herein filed, entered in this action on the 15th day of March, 1955, if the plaintiffs shall pay all costs adjudged against them if the appeal is dismissed or the judgment and order affirmed or such costs as the appellate court may award if the judgment and order is modified, then this bond is to be void, but if the plaintiffs fail to perform this condition, payment of the amount of this bond shall be due forthwith.

/s/ HELENA J. PHELAN

/s/ ELDER C. CRAIN,

Signed and acknowledged before me this 13th day of April, 1955.

[Seal] /s/ ENRIQUE R. MESA,
Notary Public in and for the unincorporated territory of Guam.

[Endorsed]: Filed April 13, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Richard C. Lamkin and Anthony B. Silvia, the plaintiffs herein hereby appeal to the United States Court of Appeals for the Ninth Circuit from the order of the District Court of Guam dismissing the complaint herein filed, entered in this action on the 15th day of March, 1955.

Dated at Agana, unincorporated territory of Guam, this 13th day of April, 1955.

/s/ FINTON J. PHELAN, JR.,
/s/ E. R. CRAIN,
Attorneys for Plaintiffs

[Endorsed]: Filed April 13, 1955.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

Plaintiffs herewith present the points upon which they claim the Court erred.

1. In disregarding the amended complaint filed on the 3rd day of March, 1955 and after said amended complaint was filed and served in holding a hearing upon the original complaint and the motions directed at said original complaint.

2. In entering summary judgment for the defendants upon the complaint which had been superseded by an amended complaint.

3. In entering summary judgment.

4. In finding and holding that the defendants were entitled to a judgment as a matter of law and that there existed no material issues of fact unresolved.

5. In disregarding the clear admission of J. Russell Marshall in his affidavit enumerating the illegal acts being performed by defendants.

6. In disregarding the allegations of the complaint and the admissions of defendants and entering summary judgment contrary to law and the provisions of the Federal Rules of Civil Procedure.

7. In considering matters not before the Court and which the Court cannot have judicial notice of.

8. In disregarding the admitted breach of contract by defendants.

9. In misconstruing the applicable statutes of the United States.

10. In refusing to acknowledge the fact that withholding within Guam is contrary to the statute, a fact admitted by defendants.

11. In refusing to acknowledge the fact that employees of the Government of Guam under color of their office and under the claim of statutory authority are violating the statutes of the United States and with the threats of their powers are coercing defendants into converting vast sums of monies from plaintiffs and many others, contrary to law.

12. In failing to recognize the illegal confiscation of portions of the salaries of plaintiffs without warrant in law.

13. The Court clearly displayed its bias against plaintiffs and that it had prejudged the case.

14. In precluding plaintiffs from demonstrating by competent evidence the merits of their claim.

Dated at Agana, Guam, this 17th day of May, 1955.

/s/ FINTON J. PHELAN, JR.,

/s/ E. R. CRAIN,

Attorneys for Plaintiffs

[Endorsed]: Filed May 19, 1955.

[Title of District Court and Cause.]

MINUTES

1955

2-17 (1) Motion to Dismiss and (2) Motion for Summary Judgment having been filed this day, Ordered hearing on said motions be had on Friday, March 4, 1955, at 9:30 a.m.

3- 4 Hearing:

Plaintiffs appear by E. R. Crain and Finton J. Phelan, Jr., their attorneys.

Defendants appear by H. G. Homme, Jr., U. S. Attorney.

Court rules that Amended Complaint adds nothing to the original complaint upon which relief can be granted and that the addition of the 4th Count has nothing to do with the basic issues.

Therefore, court hears the arguments of the attorneys on the Motion for Summary Judgment. Motion granted and the attorney for the defendants is directed to prepare a judgment for the record and file the same with the court within 10 days.

DOCKET ENTRIES

1954

10-28 1. Filed Complaint. Issued summons and two copies of Complaint to U. S. Marshal.

10-30 2. Filed Order of appointment of Charles Owen as special process server.

11- 1 3. Filed summons returned served Oct. 30.

1954

- 11-19 4. Filed stip. extending time to answer, move or otherwise plead to Jan. 19.

1955

- 1-19 5. Filed stip to extend time to plead to Feb. 18.

- 2-17 6. Filed Motion to Diss and (2) Motion for Summary Judgt.

- 2-17 7. Filed Notice of Mtn—Hearing March 4, 9:30.

- 2-17 8. Filed receipt of service of Motion by atty for pltf.

- 3- 3 9. Filed Amended Complaint.

HNG: Attys present. Arguments of attys had. Ct. rules that Amend Complnt adds nothing to original complnt on which relief can be granted. Ct grants mtn for Summ Judgt and directs atty for defts to prepare Judgt and file same with the Ct.

- 3-15 10. Filed Summary Judgt in favor of defts.

- 3-22 11. Filed copy of ltr of transm of copy of Summ Judgt to attys.

- 4-13 12. Fld Bond for Costs on Appl.

- 4-13 13. Fld Notice of Appl.

- 4-16 14. Fld copy of clk's ltr advsng defts' atty re Notice of Appl.

- 5-19 15. Fld Statement of Points on Appeal.

- 5-19 16. Fld. Reporter's Transcript of proceedings.

- 5-19 17. Fld Designation of Contents of Record on Appeal.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Roland A. Gillette, Clerk of the District Court of Guam for the Territory of Guam, M. I., do hereby certify that the following documents, to wit:

1. Complaint, filed October 28, 1954.
2. Stipulation of counsel, filed November 19, 1954.
3. Stipulation of counsel, filed January 19, 1955.
4. Motion to dismiss and for summary judgment and supporting affidavits of J. Russell Marshall, together with Exhibits A, B, C, D, E, F, G, H, I, J, K, and L thereto, filed February 17, 1955.
5. Notice of Motion, filed February 17, 1955.
6. Amended Complaint, filed March 3, 1955.
7. Summary Judgment, filed March 15, 1955.
8. Bond for costs on appeal, filed April 13, 1955.
9. Notice of Appeal, filed April 13, 1955.
10. Statement of Points on Appeal, filed May 19, 1955.
11. Transcript of proceedings, filed May 19, 1955.
12. Designation of contents of record on appeal, filed May 19, 1955.
13. Minutes and Docket entries,—are the original documents filed in the office of the Clerk of the District Court of Guam in the above entitled case.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of the aforesaid court at Agana, Guam, M. I., this 19th day of May, A.D., 1955.

[Seal]

/s/ ROLAND A. GILLETTE

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS

March 4, 1955, Agana, Guam

Before: The Honorable Paul D. Shriver, Judge.

Appearances: For the Plaintiffs: E. R. Crain and Finton J. Phelan, Jr., Attorneys at Law, Agana, Guam. For the Defendants: H. G. Homme, Jr., United States Attorney, Agana, Guam.

Friday, March 4, 1955, 9:30 a.m.

The Court: First order of business?

The Clerk: We have the matter of Richard C. Lamkin, et al, vs. Brown and Root, Inc. et al.

The Court: What is our situation now? There has been an amended complaint filed?

Mr. Homme: That is right, your Honor.

The Court: What changes were made in your amended complaint?

Mr. Crain: There was a fourth count added and certain changes made in the other counts.

The Court: It seems to me the issues are in no way changed by your amended complaint. You contend that the employer has no right or authority to honor a distraint by the Government of Guam. We have the motion for summary judgment where the employers do consider themselves bound and have simply complied with the order of the Government of Guam. Now is there any issue except whether or not the Government of Guam has that authority?

Mr. Phelan: Yes, we raise the issue of withholding. Title 26 says you do not withhold within a

possession unless you are an employee of the United States.

The Court: It doesn't say the Government of Guam cannot require——

Mr. Crain: If you read Section 1621 and apply the mirror application to that, it does.

The Court: Well, your issue is simply whether or not Section 31 of the Organic Act of Guam gives the local collector the authority to require withholding and to distraint for the non-payment of tax deficiencies. It is impossible to escape the conclusion that if the government has to live from its revenue, if the United States Congress, as a legislative body, has spoken, and if the courts have held that the tax is levied and is to be collected by the local officials of the Government of Guam, how can an employer be placed in a position of not complying? Certainly the individual taxpayer if he has done everything that he is required to do is entitled to relief but nowhere do you contend here that the individual taxpayer is not obligated to pay, do you?

Mr. Phelan: The Government of Guam is not a party to this action; we don't have to.

The Court: But the employer has set up by affidavit his defense and that has not been countered by any affidavit.

Mr. Phelan: We have an amended complaint in there which, under the rules, I believe we have a right to file.

The Court: Yes, you have a right under the rules, of course, but not necessarily after the matter is at issue.

Mr. Phelan: If it please the court, how long is a matter at issue without an answer?

The Court: There is the motion for summary judgment.

Mr. Phelan: That is not in answer to the pleadings.

The Court: Now the motion for summary judgment is to enable the court to pass upon the questions raised in a complaint where there is no material fact which remains in dispute. Now your position is solely one of law.

Mr. Phelan: If it please the court, how can a ruling be made on a complaint which has now been superseded by an amended complaint and there is no motion to that amended complaint?

The Court: Well, I am simply exploring the question as to whether your amended complaint raises anything which is not answered by the summary judgment. That is the question I asked you and you said you added a fourth count, conspiracy, which in my view does not change the situation one iota. You have a question of law. Certainly the collector and employer and so forth cannot be guilty of violating a person's civil rights if all they are doing is following the law enacted by the Congress of the United States. It is quite futile to pretend otherwise. Either the law is valid or it isn't valid. So in considering this this morning I am considering whether or not your amended complaint presents any question to which the employer is required to move, or whether the motion for summary judgment covers that as well as the other allega-

tions. This is simply the same old contention in different dress—that the Government of Guam has no authority under Section 31 to require people whose income is earned in Guam to pay an income tax on that income and give it to the collector or the authority to distraint in those instances when the employee does not pay voluntarily and as a corollary of the imposition of the tax that the employer must withhold on the same basis as though the employee were being employed in the continental United States. Now what injustice are we dealing with here? What are we talking about that is wrong, that is injurious, that is unjust to the employee?

Mr. Phelan: The whole history of these distraints down at BPM violate the statutes. They have never attempted to follow the statute in any way. We have never in any of these cases succeeded in getting the facts before this court. There has never been a trial on the issues.

The Court: I don't think you have ever raised those issues.

Mr. Phelan: I don't know.

The Court: You have always raised the questions of law coupled with some general statement.

Mr. Phelan: Under the federal rules, if it please the court, we have gotten away from the preciseness and minute details of the common law in the older pleadings.

The Court: That is correct but you are still bound by the federal rules which say you must

allege facts upon which relief can be granted. What relief do you expect the court to grant here?

Mr. Phelan: I want BPM to stop withholding from my client money that is owed to the United States in tax.

The Court: In other words, you want to reach the question as to whether or not your client owed the tax?

Mr. Phelan: The question is has BPM any right to withhold the tax.

The Court: But the ultimate question is whether your client owed the tax. It is all part of the general pattern. Now if it is your contention that the collector is attempting to obtain from your client something to which the collector isn't entitled monetarywise then certainly you are entitled to relief in court most assuredly, but what relief can this court give you if the employer is merely doing what it is obligated to do by law? Granted that it may be onerous on the employer but that isn't the employee's responsibility or his privilege to say "You are embarrassing my employer by an undue number of distraints" and so forth. Possibly the employer can complain but not the employee. It seems to me the employee has to come into this court and say "Somebody is trying to take my property without due process of law, without giving me an opportunity to be heard."

Mr. Phelan: I think we said that.

The Court: And if that is true, his quarrel is with the collector. The collector has the authority. That is always true, gentlemen, in any system of

tax collection. Of necessity the government has to place the burden on the taxpayer to demonstrate that a collection is improper, and under our system of income tax it has been held repeatedly the taxpayer ordinarily must pay and then sue to recover.

Mr. Crain: If the court please, the collector has not shown that authority to BPM because BPM hasn't alleged it in the affidavit which has been filed with this motion. BPM say on information and belief they think they are paying this money to the proper party and that isn't sufficient in the affidavit to support the motion.

The Court: The court has told them that they are paying it to the proper party.

Mr. Phelan: Told BPM?

The Court: The Court of Appeals has told it referentially.

Mr. Phelan: In this case but it is not *res judicata* in any case except the Laguana.

The Court: It certainly is *res judicata* in that in principle this is a proper tax to be paid to the proper officials of the local government.

Mr. Phelan: Not as I read the opinion, your Honor.

The Court: That is precisely the question that was presented. I don't see how it is going to assist the court or the parties or anything else in this case to continue the case because the plaintiffs at the last moment have filed an amended complaint.

Mr. Crain: If the court please, the government waited four months to answer this complaint. I

don't think it only should be put on us that we are negligent.

The Court: During those four months you had four months for amendment.

Mr. Crain: Why is the burden put upon us to be prompt alone?

The Court: Well, it isn't entirely but what does it profit to have the defendant again answer your fourth cause of action and again move if everything that the defendant contends is now before the court?

Mr. Crain: I don't think the defendant has contended that, if your Honor please. In fact counsel for the defendant has indicated he desires to forward this complaint to the Department of Justice for instructions. I don't see why conclusions should be drawn that aren't before the court.

The Court: What conclusions are you referring to?

Mr. Crain: The conclusion that the defendant will merely refile his motions as they stand now.

The Court: Well, I will hear from the government. What do you want?

Mr. Homme: The government will stand on its present motion to dismiss, at least as it relates to the three counts alleged in the original complaint to which the motion is directed, the present motion to dismiss and the present motion for summary judgment. However, if the plaintiffs would insist that their amended complaint, which they file as a matter of right, defeats the motion at this time, the government would make no objection to orally

amending its initial motion to dismiss and its motion for summary judgment to include the amended complaint and let the matter come up before the court at some subsequent time for this reason: Count No. 4 charges a series of offenses against the defendants or cost-plus-fixed-fee government contractor. At the present time the United States represents the defendants directly as a cost-plus-fixed-fee contractor. However, the inferences of Count No. 4, because of its seriousness, I feel, should possibly be called to the attention of the United States in order that they may consider a direct intervention. I am afraid that if we were to—counsel for the defense has no further statement.

The Court: The court holds in this case that the fourth count of the amended complaint, the only respect in which the original complaint was changed, and to which the motion for dismissal and summary judgment was directed, fails to state facts or circumstances upon which the court could grant relief; that there is nothing more than a bombastic and unsupported series of generalizations. The court therefore directs its attention to the motion for summary judgment, bearing fully in mind that a motion for summary judgment assumes the fact that there are no issues of fact that remain in the controversy and upon which the court must pass. The original complaint and the amended complaint represent nothing more than a continuance on the part of some delinquent taxpayers to defeat the Congressional purpose of Section 31 of the Organic Act of Guam. Regardless of any initial confusion

as to the application of that provision, the determination of the courts is that the effect of Section 31 is to impose a territorial tax measured by the tax which the same individual would have to pay in the continental United States; that of necessity the Congress does not levy taxes unless it expects them to be collected, but in using the phrase "income tax laws" it meant to do more than to levy a tax; that it intended to vest in the proper collection officials those machineries for collection which are essential to the obtaining of tax funds; that it has been the policy of the United States government for many years to impose the pay-as-you-go plan of income tax collection and as part of that collection method, it has required employers to withhold taxes and in turn has protected employers who withheld and paid taxes to the proper officials by denying the courts any right to interfere with them and requiring the aggrieved taxpayer to follow the administrative procedures. That is what has been done in Guam. This employer is possibly the largest single employer outside of the United States of America in the island of Guam. It is trying to comply with the law. There is no showing here that the taxpayer has in any way been injured except that he is denied the assistance of the court in evading his tax responsibility. Nothing more. If he is not evading his tax responsibility then his remedy is against the collector who has received the withheld taxes. This complaint is again typical of an almost impertinent type of pleading in which the pleader again infers that the tax col-

lector is some kind of imposter, some person who alleges that he holds the position; attempting to surround the pleading with an impression that we are dealing here with a number of false public officials, people who pretend to act, people who pretend to do this. In conclusion the court finds that the addition at the last moment of the fourth count in the amended complaint adds nothing to the basic issues and it is insufficient to raise any question under the civil rights statute of the United States; that the defendant's motion for summary judgment is valid. The court therefore grants the motion for summary judgment and directs the defendant to prepare a judgment for the record and have it filed in this case.

[Endorsed]: Filed May 19, 1955.

[Endorsed]: No. 14772. United States Court of Appeals for the Ninth Circuit. Richard C. Lamkin and Anthony B. Silvia, Appellants, vs. Brown and Root, Inc., Pacific Bridge Company, Inc., Maxon Construction Company, Inc., Utah Construction Company, Inc., and Swinnerton and Wallberg, a co-partnership, Joint Adventurers doing business under the name of Brown, Pacific Maxon, Appellees. Transcript of Record. Appeal from the District Court of Guam, Territory of Guam.

Filed: May 23, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14772

RICHARD C. LAMKIN, et al., Appellants,

vs.

BROWN AND ROOT, INC., et al., Appellees.

STATEMENT OF POINTS ON APPEAL

The points upon which Appellants will rely on appeal are:

The Court erred in the following particulars:

1. In holding that no genuine issue of a material fact remained.
2. In entering summary judgment for appellees.
3. In entering judgment in favor of appellees upon insufficient affidavit and contrary to the admissions made by the appellees.
4. In taking judicial notice of facts not properly before the Court and basing the judgment of the Court upon such facts.
5. In accepting the affidavit in support of appellees' motion as proof of the facts therein contained.
6. In holding and entering summary judgment based upon holdings contrary to the provisions of the United States statutes.
7. In entering summary judgment upon the complaint, which was not before the court.
8. In entering summary judgment based upon the Court's pre-judging of the case.

9. Misconstruing the pertinent statutes of the United States.

Dated at Agana, unincorporated territory of Guam, this 27th day of June, 1955.

/s/ FINTON J. PHELAN, JR.,
/s/ FINTON J. PHELAN, JR.,
For E. R. Crain,
Attorney for Appellants

[Endorsed]: Filed Jun. 29. 1955. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Pursuant to Rule 75 (a) of the Federal Rules of Civil Procedure, the plaintiffs-appellants hereby designate for inclusion in the record on appeal to the United States Court of Appeals for the Ninth Circuit, taken by notice of appeal filed April 13, 1955, the following portions of the record, proceedings, and evidence in this action:

1. The complaint.
2. The amended complaint.
3. Stipulation of counsel of November 19, 1954.
4. Notice of motion, motion to dismiss and for summary judgment and supporting affidavit of J. Russell Marshall, together with Exhibits A, B, C, D, E, F, G, H, I, J, K, and L thereto, filed February 17, 1954.

5. Summary judgment dated March 15, 1955.
6. Reporter's transcript of proceedings of March 4, 1955.
7. Plaintiffs' notice of appeal and bond.
8. Plaintiffs' statement of points upon appeal.
9. The clerk's docket entries.
10. The clerk's minute entries.
11. The journal entries.
12. All other documents and exhibits in this file.
13. This designation.

Dated at Agana, unincorporated territory of Guam, this 27th day of June, 1955.

/s/ FINTON J. PHELAN, JR.,

/s/ FINTON J. PHELAN, JR.,

For E. R. Crain,

Attorneys for Appellants

[Endorsed]: Filed Jun. 29, 1955. Paul P. O'Brien,
Clerk.

No. 14,772

IN THE

United States Court of Appeals
For the Ninth Circuit

RICHARD C. LAMKIN and
ANTHONY B. SILVIA,

Appellants,

VS.

BROWN AND ROOT, INC., PACIFIC BRIDGE
COMPANY, INC., MAXON CONSTRUCTION
COMPANY, INC., UTAH CONSTRUCTION
COMPANY, INC., and SWINERTON and
WALBERG, a Co-Partnership, Joint
Adventurers doing business Under
the Name of Brown-Pacific-Maxon,

Appellees.

On Appeal from the District Court of Guam for the
Unincorporated Territory of Guam.

APPELLANTS' OPENING BRIEF.

FINTON J. PHELAN, JR.,

Suite 201-203 Mesa Building, First Street West, Agaña, Guam

Attorney for Appellants.

FILED

NOV -4 1955

PAUL P. O'BRIEN, CLERK

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No. 14,772

IN THE

**United States Court of Appeals
For the Ninth Circuit**

RICHARD C. LAMKIN and
ANTHONY B. SILVIA,

Appellants,

vs.

BROWN AND ROOT, INC., PACIFIC BRIDGE
COMPANY, INC., MAXON CONSTRUCTION
COMPANY, INC., UTAH CONSTRUCTION
COMPANY, INC., and SWINERTON and
WALBERG, a Co-Partnership, Joint
Adventurers doing business Under
the Name of Brown-Pacific-Maxon,
Appellees.

**On Appeal from the District Court of Guam for the
Unincorporated Territory of Guam.**

APPELLANTS' OPENING BRIEF.

JURISDICTION.

This is an appeal from a Summary Judgment entered by the District Court of Guam on the 15th day of March, 1955, in favor of the appellees herein, the defendants in the Court below. Jurisdiction to hear this appeal is in this Court, pursuant to the provi-

sions of Sections 1291, 1294, Title 28 U.S.C.A. This action arises under and seeks the construction of the Internal Revenue Code of 1939 as amended, the Internal Revenue Code of 1954, and the Organic Act of Guam, Chapter 8 A, Title 48, U.S.C.A.

STATEMENT OF THE CASE AND QUESTIONS PRESENTED.

This case is one seeking a determination of the rights of appellants' employers to withhold sums of monies from appellants' wages and without appellants' consent to turn over such monies so withheld to employees or officers of the Government of Guam or to anyone else.

Appellees are joint-adventurers, exclusively engaged in performing certain construction in Guam under a cost-plus fixed fee contract with the United States Navy. This contract has been in effect for several years. Appellees' offices within Guam are situated upon Military Reservations of the United States.

Appellees, to fulfill their contract obligations, have employed various individuals under written contract to work on construction projects at any Island or Base west of the 180th Meridian, or within the Western Pacific Area. Appellants, upon being so employed by appellees, were assigned to work being performed by appellees for the United States Navy on the Island of Guam.

Appellant Lamkin was employed by appellees in the State of Colorado in September, 1952, executing a

contract of employment dated at Denver on the 17th day of that month. Under that contract appellant Lamkin came to the Island of Guam and has since worked for appellees.

Appellant Silvia entered into similar contracts with appellees, the first having been executed in the State of Massachusetts in the year 1948.

Both appellants have been employed by appellees within Guam pursuant to these contracts or under modified and renewed ones. Neither appellant is, or claims to be, an employee of the United States, or a resident or citizen of Guam, and have retained their permanent domicile in their respective State of residence. Appellants, while on Guam, have been employed by appellees on construction work at United States Military Reservations and have resided in quarters provided by appellees situated on a Military Reservation.

Appellees have caused their employees to execute, since the latter part of 1950, United States Treasury Department Forms W-4 (employees withholding exemption certificate). Such forms were executed by appellants Lamkin on November 20, 1952, and Silvia on December 15, 1950, respectively. Neither appellant ever executed any similar form with respect to any tax other than taxes due, if any, to the United States. Appellees have deducted from the wages of appellants and other employees at the rates provided by the United States Internal Revenue Code and regulations for United States taxes. However, such sums have

not been paid over to the United States Treasury, or any officer thereof, but were paid over to the Treasurer of the unincorporated territory of Guam. Appellants, at no time, have authorized such payment.

Payment by appellees to the Government of Guam was pursuant to a claim of that Government that appellants owe income taxes to it; that it has such a tax and authority to collect; and that such taxes are in the same amounts as would be due to the United States. The Government of Guam allegedly having assessed deficiencies and claiming additional monies from appellants delivered to appellees purported levies and warrants of distraint, demanded payment from appellees of the wages due, and to become due to appellants, until these demands were met. Appellees refused to pay wages to appellants, withholding the same when due, turned the wages due and earned by appellants over to the Government of Guam.

Commencing upon the 30th day of September, 1954, wages due to appellants were not paid until the sum of \$504.26 due to appellant Lamkin, and \$221.85, due to appellant Silvia had been retained and turned over to the Government of Guam upon this alleged debt.

Appellants, never having authorized such payment and asserting that they were not indebted to the Government of Guam, accordingly commenced this action, seeking damages for breach of their employment contracts and for depriving them of their property without due process of law, for repayment of the sums of money due to appellants, improperly withheld and paid to the Government of Guam to restrain

the appellees in the future from wrongfully withholding monies from their wages contrary to Title 26 U.S.C.A. and turning such monies over to agents of the Government of Guam.

After several extensions of time given appellees within which to answer, the United States Attorney for Guam, appearing for appellees under their contract which provides that the United States will defend actions brought against appellees arising from such contract, moved to dismiss the complaint and for summary judgment. It should be noted that the United States is not a party to this action and also that the Government of Guam has never intervened or sought to. Appellants filed thereupon an amended complaint. Disregarding the amended complaint, the District Court of Guam proceeded to conduct a brief hearing and granted the motion for summary judgment.

Appellants alleging numerous errors by the District Court of Guam accordingly noticed this appeal. The claimed errors, we believe, fall into two categories, first procedural in the application of the Federal Rules of Civil Procedure, errors which unfortunately confuse and obscure the issues; and, second, misconstruing and misapplying the pertinent statutes of the United States.

The questions to be decided are, briefly, was the District Court of Guam in error in holding that no genuine issue as to a material fact existed? In entering summary judgment for appellees, basing the same on an insufficient affidavit and in disregard of the admissions of appellees.

In knowing judicially facts not before the Court and resting the judgment upon such facts.

In treating the affidavit of appellees as proof of the facts therein alleged rather than as proof of the existence or non-existence of a controverted fact.

In holding and entering judgment contrary to the provisions of the statutes of the United States and upon a complaint not before the court.

In entering judgment based upon the court's preconceived judgment and misconstruction of the statutes of the United States.

Appellants view this controversy as not a contest as to whether or not the Government of Guam has a tax, but did appellees have any right, legal or otherwise, to do the acts complained of. Was there before the District Court of Guam any evidence which can in any measure justify the acts of appellees. This is an action between private parties seeking relief from the illegal retaining of appellants' pay and giving it away, to restrain such action in the future, and for damages.

CONSTITUTION, STATUTES AND RULES INVOLVED.

Constitution, of the United States.

Article VI. “. . . This Constitution, and the laws of the United States which shall be made in pursuance thereof; . . . shall be the supreme law of the land; and the judges in every State shall be bound thereby, . . .”.

Amendment IV. "The right of the people to be secure in their . . . papers and effects, against unreasonable . . . seizures, shall not be violated, . . .".

Amendment V. "No person . . . , nor be deprived of life, liberty, or property, without due process of law, . . .".

Title 26, U.S.C.A.

Section 53. Time and place for filing returns.

(b) To whom return made.

(1) Individuals. Returns (other than corporation returns,) shall be made to the collector for the district in which is located the legal residence or principal place of business of the person making the return, or, if he has no legal residence or principal place of business in the United States, then to the collector at Baltimore, Maryland.

(2) Corporations. Returns of corporations shall be made to the collector of the district in which is located the principal place of business or principal office or agency of the corporation, or, if it has no principal place of business or principal office or agency in the United States, then to the Collector at Baltimore, Maryland. 53 Stat. 28.

Section 62. Rules and regulations.

The Commissioner, with the approval of the Secretary, shall prescribe and publish all needful rules and regulations for the enforcement of this chapter. 53 Stat. 32.

Section 272. Procedure in general.

((a) (1) Petition to the Tax Court of the United States.) If in the case of any taxpayer,

the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail.

Section 273. Jeopardy assessments.

(a) Authority for making. If the Commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay, he shall immediately assess such deficiency (together with all interest, additional amounts, or additions to the tax provided for by law) and notice and demand shall be made by the collector for the payment thereof.

Section 1621. Definitions. As used in this subchapter.

(a) Wages. The term "wages" means all remuneration (other than fees paid to a public official) for services performed by an employee for his employer, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include remuneration paid— . . . (8) . . . (B) for services for any employer (other than the United States or any agency thereof) performed by a citizen of the United States within a possession of the United States (other than Puerto Rico), if it is reasonable to believe that at least 80 per centum of the remuneration to be paid to the employee by such employer during the calendar year will be for such services, . . .

Section 3612. Returns executed by Commissioner of Collector:

“(a) Authority of collector. If any person fails to make and file a return or list at the time prescribed by law or by regulation made under authority of law, or makes, willfully or otherwise, a false or fraudulent return or list, the collector or deputy collector shall make the return or list from his own knowledge and from such information as he can obtain through testimony or otherwise;

“(b) Authority of Commissioner. In any such case the Commissioner may, from his own knowledge and from such information as he can obtain through testimony or otherwise;

“(1) To make return. Make a return, or

“(2) To amend Collector’s return. Amend any return made by a collector or deputy collector.

“(c) Legal status of returns. Any return or list so made and subscribed by the Commissioner, or by a collector or deputy collector and approved by the Commissioner, shall be *prima facie* good and sufficient for all legal purposes.

“(d) Additions to tax.

“(1) Failure to file return. In case of any failure to make and file a return or list within the time prescribed by law, or prescribed by the Commissioner or the collector in pursuance of law, the Commissioner shall add to the tax 25 per centum of its amount, except that when a return is filed after such time and it is shown that the failure to file it was due to a reasonable cause and not to willful neglect, no such addition shall be made to the tax: Provided, That in the case of a failure

to make and file a return required by law, within the time prescribed by law or prescribed by the Commissioner in pursuance of law, if the last date so prescribed for filing the return is after August 30, 1935, then there shall be added to the tax, in lieu of such 25 per centum: 5 per centum if the failure is for not more than 30 days, with an additional 5 per centum for each additional 30 days or fraction thereof during which failure continues, not to exceed 25 per centum in the aggregate.

“(2) Fraud. In case a false or fraudulent return or list is willfully made, the Commissioner shall add to the tax 50 per centum of its amount . . .

“(f) Determination and assessment. The Commissioner shall determine and assess all taxes, other than stamp taxes, as to which returns or lists are so made under the provisions of this section. 53 Stat. 437.”

Section 3640. Assessment authority:

“The Commissioner is authorized and required to make the inquiries, determinations, and assessments of all taxes and penalties imposed by this title, or accruing under any former internal revenue law, where such taxes have not been duly paid by stamp at the time and in the manner provided by law. 53 Stat. 442.”

Section 3650. Collection districts:

“(a) Establishment and alteration. For the purpose of assessing, levying, and collecting the

taxes provided by the internal revenue laws, the President may establish convenient collection districts, and may from time to time alter said districts.

“(b) Number. The whole number of collection districts for the collection of internal revenue shall not exceed 65.

“(c) Boundaries.

“(1) Hawaii. The Territory of Hawaii shall constitute a district for the collection of the internal revenue of the United States, with a collector, whose office shall be at Honolulu, and deputy collectors at such other places in the several islands as the Secretary shall direct.

“(2) Elsewhere. For the purpose mentioned in sub-section (a), the President may subdivide any State, Territory, or the District of Columbia, or may unite two or more States or Territories into one district. 53 Stat. 445.”

Section 3655. (a) Delivery.

Where it is not otherwise provided, the collector shall in person or by deputy, within ten days after receiving any list of taxes from the Commissioner, give notice to each person liable to pay any taxes stated therein, to be left at his dwelling or usual place of business, or to be sent by mail, stating the amount of such taxes and demanding payment thereof.

Section 3670. Property subject to lien.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount

(including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. 53 Stat. 448.

Section 3671. Period of lien:

“Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time. 53 Stat. 449.”

Section 3690. Authority to distrain.

If any person liable to pay any taxes neglects or refuses to pay the same within ten days after notice and demand, it shall be lawful for the collector or his deputy to collect the said taxes, with such interest and other additional amounts as are required by law, by distraint and sale, in the manner provided in this subchapter, of the goods, chattels, or effects, including stocks, securities, bank accounts, and evidences of debt, of the person delinquent as aforesaid. 53 Stat. 451.

Section 3692. Levy.

In case of neglect or refusal under section 3690, the collector may levy, or by warrant may authorize a deputy collector to levy, upon all property and rights to property, except such as are exempt by the preceding section, belonging to such person, or on which the lien provided in section 3670

exists, for the payment of the sum due, with interest and penalty for nonpayment, and also of such further sum as shall be sufficient for the fees, costs, and expenses of such levy. 53 Stat. 452.

Section 3797. Definitions.

“. . . (11) Secretary. The term ‘Secretary’ means the Secretary of the Treasury.

(12) Commissioner. The term ‘Commissioner’ means the Commissioner of Internal Revenue. . . .”.

Section 3901. Powers and duties.

“(a) Assessment and collection. The Commissioner, under the direction of the Secretary—

(1) General Superintendence. Shall have general superintendence of the assessment and collection of all taxes imposed by any law providing internal revenue; and

“(2) Regulations, form, stamps, and dies. Shall prepare and distribute all the instructions, regulations, directions, forms, blanks, stamps, and other matters pertaining to the assessment and collection of internal revenue; and shall provide hydrometers, and proper and sufficient adhesive stamps and stamps or dies for expressing and denoting the several stamp taxes, or, in the case of percentage taxes, the amount thereof; and alter and renew or replace such stamps from time to time, as occasion may require.”

Section 3967. Prohibition upon discharge of another collector’s duties.

“No collector shall be detailed or authorized to discharge any duty imposed by law upon any other collector. 53 Stat. 484.”

Section 4041. Issue of instructions, regulations and forms:

“(a) In general. The Secretary shall prescribe forms of entries, oaths, bonds, and other papers, and rules and regulations, not inconsistent with law, to be used under and in the execution and enforcement of the various provisions of the internal revenue laws; and he shall give such directions to collectors and prescribe such rules and forms to be observed by them as may be necessary for the proper execution of the law . . .”

Title 28 U.S.C.A.

Section 1331. Federal question; amount in controversy:

“The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States.”

Section 1340. Internal revenue; customs duties:

“The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Customs Court.”

Section 1343. Civil Rights:

“... (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for

equal rights of citizens or of all persons within the jurisdiction of the United States.”

Section 1357. Injuries under Federal Laws:

“The district courts shall have original jurisdiction of any civil action commenced by any person to recover damages for any injury to his person or property on account of any act done by him, under any Act of Congress, for the protection or collection of any of the revenues, or to enforce the right of citizens of the United States to vote in any State.”

Title 48 U.S.C.A.

Section 1421. (b) Bill of Rights.

“. . . (e) No person shall be deprived of life, liberty, or property without due process of law.

“(f) Private property shall not be taken for public use without just compensation . . .”

Section 1421h. “Duties and taxes to constitute fund for benefit of Guam.

“All customs duties and Federal income taxes derived from Guam, the proceeds of all taxes collected under the internal-revenue laws of the United States on articles produced in Guam and transported to the United States, its Territories, or possessions, or consumed in Guam, and the proceeds of any other taxes which may be levied by the Congress on the inhabitants of Guam, and all quarantine, passport, immigration, and naturalization fees collected in Guam shall be covered into the treasury of Guam and held in account for the government of Guam, and shall be expended for the benefit and government of Guam

in accordance with the annual budgets. Aug. 1, 1950, c. 512, § 30, 64 Stat. 392.”

Section 1421i. “Applicability of Federal income tax laws:

“The income tax laws in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in Guam. Aug. 1, 1950, c. 512, § 31, 65 Stat. 392.”

F.R.C.P. Rule 56.

“. . . The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . .

“(e) Form of Affidavits; Further Testimony.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.”

SUMMARY OF ARGUMENT.

Appellants claim that the District Court erred and should be reversed. This action commenced by appellants for a breach of their employment contracts and

resulting damages was converted into a tax case by the affidavit of appellees and so treated and disposed by the Court.

The District Court erred in holding that no genuine issue as to a material fact remained, controverted of course, existed and in entering the summary judgment for the appellees upon an affidavit insufficient upon its face one which in fact clearly demonstrated the existence of numerous material issues which are controverted and upon which evidence should be received. Of course the preconceived concept of the Court that this action is solely and exclusively a tax action against a defendant who is not a party may well have led to the error.

The District Court assumed and acted upon that assumption, that certain facts have been conclusively established and therefore there could be no merit in this action. The Court could not have held as it did unless it held the following facts to be proved. Yet these facts are beyond proper judicial knowledge and we submit have nowhere been established. That there is a territorial income tax, rather than the United States tax; that the Government of Guam has power to require withholding and has, contrary to Section 1621 T 26, U.S.C.A.; that there is no question as to the existence of the alleged offices, the occupants of which are claiming the power and right to enforce this tax, that their offices were duly created, yet no such statute in fact exists, that all necessary powers have been delegated, an act contrary to Title 26, U.S.C.A.; that the question is not "Have appellees the right to

act as they have," but "Do appellants owe a tax?" Clearly, the Court took improper notice of facts and acted upon such notice.

The Court improperly accepted the affidavit as conclusive proof to the contrary of facts pled in the complaint rather than considering the question, "Were these materials facts in issue and controverted?" We claim likewise the Court misconstrued the rules concerning the effect of an amended complaint.

That the Court had prejudged the action and did not consider the possibility that appellants might be able to prove by competent evidence the non-existence of the tax, the offices, the delegation of powers, the validity of the levies, liens, assessments and warrants of distraint, or any of the other points, the contrary proof of which would demolish the edifice so carefully constructed by the Court without evidence. Clearly, this record, as well as the record in other similar cases, demonstrates beyond all doubt that the District Court intended that in a case of this type no sufficient opportunity to demonstrate by evidence the untenable position of the Government of Guam shall be afforded. The Court will not admit evidence to demonstrate facts that are contrary to its concepts.

The record in its entirety clearly shows that all the acts of appellees are unjustified; that they rely upon mere claims of officers asserting authority clearly contrary to statute and which cannot be delegated; that review of this record and the pertinent statutes conclusively demonstrates that the Court did not consider or apply the canons of statutory construction. Miscon-

strued statutes so plain and clear as not to require construction, judicially noticed as true facts not in existence and refused to notice that explicit provisions of Federal Law were being violated and do forbid the acts set forth of certain agents of Guam.

Therefore, the District Court of Guam should be reversed.

ARGUMENT.

Careful review of the errors to be relied upon dictates that the first three should be considered together in the interest of brevity and clarity and the others discussed separately. The errors claimed fall into two categories—procedural and the misconstruction of the pertinent statutes which govern this case.

I.

THE DISTRICT COURT OF GUAM ERRED IN (1) HOLDING THAT NO GENUINE ISSUE AS TO A MATERIAL FACT REMAINED, (2) ENTERING SUMMARY JUDGMENT IN FAVOR OF APPELLEES, (3) BASING THE JUDGMENT UPON AN INSUFFICIENT AFFIDAVIT AND DISREGARDING THE ADMISSIONS OF APPELLEES. (POINTS 1, 2, 3.)

(1). The Court erred in holding that no genuine issue as to any material fact remained. This error is clearly apparent upon a comparison of the complaint and the affidavit with exhibits of Mr. Marshall. For example: Appellants contend that appellees are private contractors. Appellees (T R 14) assert themselves to be "... solely and exclusively an administra-

tive service . . . on behalf of the Government of the United States.”

Appellants contend that they have not authorized appellees to withhold any sums except for taxes due to the United States. Exhibits “C” and “E” to Mr. Marshall’s affidavit support this. Yet, appellees assert that they have paid such sums to the Treasurer of Guam.

Appellants contend that they are not indebted to the Government of Guam. Appellees (T R 16) set forth the contention that 98 of their employees, including appellants, were alleged indebted to the Government of Guam.

Appellants (T R 17) the alleged levy and distraint and the honoring of the same “pursuant to the commands of said official . . .” comparing these with the allegations of fact set forth in both the complaint and the amended complaint, namely, that the appellees are obeying certain orders of agents of the Government of Guam, the validity of which is challenged; that appellees have breached the contracts of employment by refusing to pay wages when due; that certain agents of the Government of Guam, whose demands appellees have honored, claim to be authorized by certain sections of Title 26, U.S.C.A., a fact denied by appellants; that certain officers of the Government of Guam claim authority to administer, alter and amend Title 26, U.S.C.A., a right which appellees accede to but controverted by appellants.

Appellees assert to believe that the levies are authorized by the Revenue Act of 1939. Appellants assert

that no such authority is granted by any statute of the United States. Appellants deny any indebtedness to the Government of Guam.

Appellants assert that Section 1622 (a), (d), (g), (k), Title 26, U.S.C.A. giving withholding rates do not apply within Guam, and are contrary to Section 1621, Revenue Act of 1939, and Section 3401 of the Revenue Act of 1954. Appellees profess to believe that withholding within Guam is authorized.

Comparing the allegation of the complaint with the facts and conclusions of the affidavit, appellants contend that there are numerous genuine material facts to be determined. Appellants believe that not only is to be determined the question of breach of their employment contracts, the validity of the levies and warrants of distraint, but also the authority of the agents purporting to exercise such powers. That these matters must be proved by evidence, that they are in issue and are material and to be a good defense to the actions of appellees they must be proved by competent evidence and cannot be either implied or assumed.

Rule 56, F.R.C.P. provides that summary judgment shall not be granted unless it is clear that no material issue of fact exists and the moving party is entitled to judgment as a matter of law. Clearly, the files in this case demonstrate the existence of numerous genuine issues of fact.

Therefore, the District Court of Guam erred in holding that no genuine issue remained.

(2). Summary judgment cannot be entered unless no genuine issue as to a material fact exists and the

moving party is entitled to judgment as a matter of law. As set forth above, the existence of numerous genuine issues is clearly disclosed by the files. Under Rule 56, F.R.C.P. this precludes summary judgment and the District Court of Guam was in error.

An affidavit cannot controvert a fact well pleaded and the moving party must clearly demonstrate that no controverted issue of fact remains. Implied within this rule must be the natural inference that an affidavit which demonstrates the existence of controverted facts cannot sustain a summary judgment.

Van Brode Milling Co. v. Kellogg Company, 132 F. Supp. 330.

“... In this Circuit it is the law that an affidavit can not be used to controvert a well pleaded allegation of the complaint in order to obtain a summary judgment. *Frederick Hart & Co. v. Recordgraph Corp.*, 3 Cir., 169 F. 2d 580; *Reynolds Metals Co. v. Metals Disintegrating Co.*, 3 Cir., 176 F. 2d 90. *Frederick Hart & Co. v. Recordgraph Corp.*, 3 Cir., 169 F. 2d 580, at page 581 distinctly states ‘... no matter how likely it may seem that the pleader will be unable to prove his case, he is entitled, upon averring a claim, to an opportunity to try to prove it. ...’

“(2, 3) ... Under all the authorities, a motion for summary judgment should not be granted unless the truth is clear and the moving party is entitled to a judgment beyond all doubt and no genuine issue remains. ...”

“... Cases hold that the question presented by a motion for summary judgment is whether or not

there is a genuine issue of fact, and not how or by what evidence that issue is to be determined.”

“(4) . . . Of course, a party moving for summary judgment (here the defendants), has the burden of showing that no controverted issue of fact exists. All of the cases so hold.”

Gifford v. Travelers Protective Assn., 153 F 2d 209 (9 Cir.).

“. . . (2, 3) The question presented by a motion for summary judgment is whether or not there is a genuine issue of fact, and not how that issue should be determined. *Ramsouer v. Midland Valley R. Co.*, 8 Cir., 1943, 135 F. 2d 101. A summary judgment may issue for laches or failure to bring suit within a prescribed period of limitations. *United States for Use and Benefit of Genessee Sand & Gravel Corporation v. Fleisher Engineering & Construction Co.*, D.C.N.Y. 1942, 45 F. Supp. 781; *Reynolds v. Needle*, 1942, 77 U.S. Appl. D.C., 132 F 2d 161.”

It is believed that these cases sufficiently set forth the rule as to when summary judgment may be granted. That appellees do not come within the rule is clear. The District Court of Guam was in error in entering judgment for appellees.

(3). The District Court of Guam erred in entering summary judgment for appellees since the affidavit was insufficient and the admissions of appellees clearly demonstrate that they should not prevail.

The rule is clear and needs no citation of authorities. To warrant summary judgment the movant must

demonstrate that there exists no controverted fact. Unfortunately, the District Court of Guam was misled by the incident that the events which gave rise to this action were the attempt by agents of the Government of Guam to collect an alleged tax debt, claimed due to that Government. However, this is an action between two private parties—an employee and his employers. The action is for breach of contract, damages, and to prevent the employers from continuing to carry out threats to violate the rights of appellants under their contracts of employment. No Government is a party to the action.

Appellees seek to demonstrate that their acts are justified by showing by affidavit that the agents of the Government of Guam claim the right to levy and distrain; that a debt to the Government of Guam exists; that they believe such agents had such authority; and that, therefore, their breach of the terms of the employment contracts are justified and summary judgment should be had. Is the affidavit sufficient proof of these matters? Hardly!

Can the affidavit controvert the allegation in the complaint that appellants do not owe the monies? Can the affidavit establish the validity of the distraint, of the levies? Is it proof of the compliance with the essential steps of valid assessment, valid notice? Does it prove delegation pursuant to law by the Commissioner of Internal Revenue to these alleged agents of the Government of Guam of the powers and authorities which the appellees state in their affidavit they believe these alleged agents possess? Appellants be-

lieve that clearly the affidavit upon its face is not only insufficient but clearly itself raises numerous issues of fact which can only be proved or disproved by evidence.

The appellees did, in fact, admit that they had paid over wages due to appellants under their employment contracts, and subsequent to the filing of this action to agents of the Government of Guam. A clear admission of breach of contract. That when demanded to by local officers they intended to continue to comply in the future.

Appellees show by their Exhibits "C" and "E" that the only authority they possessed to withhold was for taxes due to the United States. They admit that the monies were not paid to the United States or its agents. Can appellees excuse their wrongful acts by saying "We were informed" (by whom?) "We believed, therefore, our acts are justified." Is not the burden upon appellees to prove that they acted properly and not to merely assert a conclusion in an affidavit. Is it not the duty of appellees to prove every material fact to show that they were justified in acting as they did once they admitted failing to pay wages to appellants as the contract provided? Should not appellees demonstrate by proof the defense which they attempt to set forth. The defense is a conclusion to be derived from evidentiary facts. Where are the facts and what are they? This affidavit is in the nature of a confession and avoidance. Can such sustain summary judgment? Is it not necessary to prove the grounds upon which the avoidance rests?

Appellants contend that the District Court of Guam erred in entering summary judgment and should be reversed.

II.

THE DISTRICT COURT OF GUAM WAS IN ERROR IN KNOWING MATTERS JUDICIALLY, WHICH WAS NOT A PROPER SUBJECT OF JUDICIAL KNOWLEDGE, WHICH WAS NOT CALLED TO THE COURT'S ATTENTION OR SUCH NOTICE INVITED AND CONSIDERING SUCH FACTS IN ARRIVING AT THE JUDGMENT.

This action only incidentally and in a collateral way touches upon, or has anything to do with, taxes. It is one brought by employees against their employers for breach of contract in not paying over wages due and earned, for damages arising from such breach, to restrain further breaches, and a claim that appellants' property was taken contrary to the provisions of the Constitution and Bill of Rights of Guam without due process of law. Appellants alleged in their complaint that the Government of Guam claimed that they were indebted to it, that it claimed their wages from their employer denied any such debt and brought this action against such employer to recover for the employers' wrongful act in confiscating their wages and giving that money to agents of the Government of Guam; also for damages for this tortious breach of contract.

Appellees, by affidavit, in support of their motion for summary judgment, attempt to justify their unlawful actions and set forth that they obeyed the commands of agents of the Government of Guam, that

they had been advised that the acts which they admitted were lawful.

Appellees admitted the contracts of employment with appellants; the United States withholding forms that were executed; that they did not pay the money over to the Government of the United States, or its agents. Appellees set forth copies of the purported levies and warrants signed by one Harry L. Mangerich as Commissioner of Revenue and Taxation. Appellees thereupon relying upon their conclusion that their acts were legal and they exculpated and proceeded no further.

The District Court of Guam went further than the parties and held as a matter of law that it had been established, conclusively it must be presumed, that the following facts had been established. (How also explain the amazing transcript and the judgment?):

First, that the Government of Guam both can and has required withholding of income taxes. This, despite Section 1621 of Title 26, U.S.C.A. which by the claim of this same Government is now a portion of their statutes. (T R 71-72.)

Second, that the sole issue is whether or not Section 31 of the Organic Act gives the local Collector authority to require withholding and to distrain; clearly a finding based upon nothing before this Court that such was in Section 31, that this Collector has such power and that the Courts had so held conclusively (T R 72); that a motion for summary judgment places the matter at issue (T R 73); that the question is whether or

not appellants owed the tax rather than as claimed that appellees had no authority to, contrary to the employment contracts, take appellants' monies and give them to another (T R 75). Thus, clearly, finding the fact to be that all matters pertaining to this alleged tax have been conclusively determined; that the Court knows these facts without evidence; that Court has so determined these facts, the same learned Court hearing this motion—the District Court of Guam; that the appellees are only doing what they are required to do in law. (T R 75.) “The collector has the authority.” (T R 75.) If this is not judicially knowing a fact in issue without evidence, nothing is.

The District Court held (T R 76) that “It certainly is *res judicata* in that in principle this is a proper tax to be paid to the proper officials of the local Government”.

Appellants assert that these excerpts and citations from the learned Judge of the District Court of Guam's comments at the hearing on this motion clearly demonstrate that the Court had found, knew, or held numerous facts to be so solely upon the belief and knowledge of the learned Court (*sic*). Appellants believe that the matters which a Court can know in the absence of evidence are the common phenomena of nature, matters of common knowledge to all mankind. To know that a matter is *res judicata* in principle is to stretch a rule of law rather to its limits. Clearly the transcript discloses that the District Court of Guam neither considered the allegations of fact nor heeded the issues. The Court clearly found that

there were proper collection officials and that they had the proper machineries. Yet none of these facts so lightly found are supported by any evidence and appellants believe are matters to be proved by appellees in this action for breach of contract.

Leong Kin Wai, 23 F 2d 789, “Judge’s personal knowledge may not be basis of decision, if not matter of general knowledge.”

Brown v. Piper, 91 U.S. 37, “In determining whether a court should take judicial notice of a particular fact, every reasonable doubt upon the subject should be resolved promptly in the negative”. Yet, all the controverted facts were without any evidence found to exist by the Court. See also *Fountain v. Tilson*, 336 U.S. 681; *Koepke v. Fontecchi*, 177 F 2d 125.

Appellants assert that the District Court of Guam accepted as true and as established without need for proof all the necessary facts to support the defenses of appellants. All this, appellants contend, is in error and the District Court of Guam should be reversed.

III.

THE COURT ERRED IN ACCEPTING THE AFFIDAVIT OF APPELLEES AS PROOF, CONCLUSIVE AGAINST THE ALLEGATIONS OF THE COMPLAINT RATHER THAN TESTING THE AFFIDAVIT AND THE COMPLAINT TO DETERMINE WHETHER THERE WERE ANY CONTROVERTED FACTS IN ISSUE.

The Court was in error in accepting the affidavit of appellees as proof, of the controverted facts, that they

were justified in turning over to agents of the Government of Guam wages due to appellants; of the fact that the demands made upon appellees were proper; that the warrants of distraint and the levies were legal, made by the duly authorized officer; and that all requisite steps to their validity had been established. All this in the face of the fact that everything was controverted and appellees were sued for breach of contract. The Court was further in error in holding that these are facts not requiring evidence but were of their very nature matters of law. Appellants can see that as a matter of law an official may have certain powers, duties and authorities but contends that it is a question of fact as to who is that officer and whether or not certain duties were delegated to him. Yet matters of this nature were found by the District Court of Guam from one affidavit.

49 F Supp. 45, Aff. 134 F 2d 173. "A summary judgment on supporting affidavit should not be granted a defendant if record discloses any basis for a claim of plaintiff." Did the record in this case show conclusively that no merit was in the claim of appellants? We believe not; yet, unless that be so, the summary judgment upon one affidavit was erroneous.

One who moves for summary judgment has the burden of showing conclusively that there is no genuine issue of fact. Did this affidavit do so? Did, or in fact, could it prove the facts upon which its conclusions were of necessity based? Appellants state that not only did it not do so but that it could not do so. Yet, the District Court of Guam accepted as proven all the

controverted facts assumed in the affidavit. This, appellants claim, was error.

In fact, does not defendants' motion admit the allegation of fact of the complaint?

Appellants contend that the Court erred in giving weight to facts assumed in the affidavit of appellees since the file itself clearly demonstrated the existence of controverted facts all material to the issues of this case.

Therefore, the District Court of Guam should be reversed.

IV.

THE DISTRICT COURT OF GUAM ERRED IN FINDING CONTRARY TO THE CLEAR COMMAND OF THE STATUTES OF THE UNITED STATES AND ENTERING JUDGMENT BASED UPON SUCH ERROR.

The District Court found that appellees had full protection for their acts in withholding sums from the wages of appellants, paying the same over to agents of Guam. That, therefore, it necessarily followed no liability to appellants existed. The District Court of Guam appears to be either playing upon words or to be confusing terms.

If the United States Congress has enacted a statute for Guam, or elsewhere, it is the command of the Congress that must be obeyed. No subordinate Governmental agency commands or requires with respect to that law. The only statutory authority cited, and this we believe, any court can notice, Section 31

of the Organic Act 1421i, Title 48, U.S.C.A. provides very clearly that the Income Tax Laws of the United States shall apply in Guam. No other law is applied or mentioned. There is no modification or deletion from the text of that law contained in the text of the Organic Act of Guam. Appellants assert that it must be held as a matter of law that the Income Tax Laws (of course excluding such portions of Title 26 as do not apply to Income Tax) in their entirety apply to Guam as a United States statute and not as a local law, that with respect to withholding it is the provisions of that statute which must govern.

Appellants believe that the Congress did not apply these laws as altered, amended or rewritten but in their entirety as enacted by Congress.

Guam is specifically defined as a possession of the United States. Section 1621 of Title 26, U.S.C.A., which is, appellants contend, part of the Income Tax Laws of the United States, specifically provides (A) "Wages. The term 'wages' means all remuneration . . .; except that such term shall not include remuneration paid . . . (8) . . . (B) for services for an employer (other than the United States or any agency thereof) performed by a citizen of the United States within a possession of the United States . . ."

Clearly, the applicable statute of the United States exempts from withholding the wages of the appellants.

Thus, the District Court of Guam was in error in holding that withholding is or was required by

the statute. Its holding that appellees therefore were justified in doing the illegal act complained of and could avoid the consequences of their breach of contract was clearly contrary to the express terms of the statute. The judgment entered upon such erroneous premise is plainly contrary to the statute and should be reversed.

This Court may notice the fact that no local statute of Guam exists requiring withholding, or, in fact, that no local statute concerning any phase of income tax has ever been enacted.

Appellants contend, therefore, that the only statute concerned is the income tax law of the United States, that such statute exempts Guam as a possession from withholding and, therefore, the judgment of the District Court should be reversed as contrary to law.

V.

THE DISTRICT COURT OF GUAM ERRONEOUSLY CONSIDERED AND ENTERED SUMMARY JUDGMENT UPON A COMPLAINT WHICH WAS NOT BEFORE THE COURT HAVING BEEN SUPERSEDED BY AN AMENDED COMPLAINT.

Rule 15, F.R.C.P. provides that a party may amend his pleading once as a matter of course. This appellants did, before any responsive pleading had been filed.

Kuhn v. Civil Aeronautics Bd., 183 F 2d 839.

The effect of an amended pleading is to supersede the original. It therefore is the one to be considered.

That the District Court of Guam at the hearing upon the motion disregarded the amended complaint, stating that no change had been made except to add a fourth count of no merit.

Appellants relying upon the plain text of the Federal Rules did not attempt to controvert with affidavits the affidavit in support of the motion, believing that a new motion would of necessity have to be filed or the old one re-filed.

Appellants believe that the Court erred in considering or discussing the original complaint and, therefore, the entry of summary judgment was contrary to the rules and improper.

VI.

THE DISTRICT COURT OF GUAM WAS IN ERROR IN ENTERING SUMMARY JUDGMENT BASED UPON THE COURT'S PRECONCEIVED BELIEFS AS TO THE MERITS OF THE CASE.

In various other actions several of which have been or which are before this Court and which appellants believe this Court may judicially notice the District Court of Guam has clearly set forth the convictions which rule the mind of that Court when considering any action which, in any manner, is concerned with the alleged territorial income tax of Guam. In like manner, this preconception of the law, and we believe, the facts, is demonstrated by the transcript of the hearing in the present action.

It may well be a philosophy of Government and of law, new and novel to many of us trained and nurtured in the simpler ways of former days. Nevertheless, appellants persist in their belief that the fundamental principles of our system of Government has not been altered and still persists.

The District Court of Guam as an individual possesses the inalienable right to hold any concept of Government, of constitutional theory or of trend of law which, in a private capacity, it may desire. We do contest the holding of any concept in a judicial capacity at variance with the established principles of our system of jurisprudence.

Appellants believe that the District Court of Guam, acting upon certain basic misconceptions of fundamental principles of our system of jurisprudence erred in this action in that the action was pre-judged in the light of those basic concepts and that the claim of appellants was considered to be basically untenable from its inception. We believe that the transcript of this hearing clearly shows that insofar as the District Court of Guam was concerned this was a matter involving income tax, that such a matter had been conclusively determined and that appellants were acting in a reprehensible and improper manner when they filed their complaint.

The following quotes from the comments of the learned Judge at the hearing, we believe, demonstrate beyond question that this action was decided beyond any doubt, not by the matters before the Court, but upon other and outside consideration. This,

it may be noted, is basically an action for breach of contract and damages flowing therefrom:

T. R. pp. 71-72.

“... You contend that the employer has no right or authority to honor a distraint by the Government of Guam. We have the motion for summary judgment where the employers do consider themselves bound and have simply complied with the order of the Government of Guam. Now is there any issue except whether or not the Government of Guam has that Authority?

Mr. Phelan. Yes, we raise the issue of withholding. Title 26 says you do not withhold within a possession unless you are an employee of the United States.

The Court. It doesn't say the Government of Guam cannot require— . . .”

“... The Court. Well, your issue is simply whether or not Section 31 of the Organic Act of Guam gives the local collector the authority to require withholding and to distraint for the non-payment of tax deficiencies . . .”

“... The Court. But the employer has set up by affidavit his defense and that has not been countered by any affidavit. . .”

T. R. p. 74.

“... This is simply the same old contention in different dress—that the Government of Guam has no authority under Section 31 to require people whose income is earned in Guam to pay an income tax on that income and give it to the collector or the authority to distraint in those

instances when the employee does not pay voluntarily and as a corollary of the imposition of the tax that the employer must withhold on the same basis as though the employee were being employed in the continental United States. Now what injustice are we dealing with here? What are we talking about that is wrong, that is injurious, that is unjust to the employee? . . .”

T. R. p. 75.

“. . . The Court. In other words, you want to reach the question as to whether or not your client owed the tax?

Mr. Phelan. The question is has BPM any right to withhold the tax.

The Court. But the ultimate question is whether your client owed the tax. It is all part of the general pattern. Now if it is your contention that the collector is attempting to obtain from your client something to which the collector isn't entitled monetarilywise then certainly you are entitled to relief in court most assuredly, but what relief can this court give you if the employer is merely doing what it is obligated to do by law? Granted that it may be onerous on the employer but that isn't the employee's responsibility or his privilege to say 'You are embarrassing my employer by an undue number of distraints' and so forth. Possibly the employer can complain but not the employee. It seems to me the employee has to come into this court and say 'Somebody is trying to take my property without due process of law, without giving me an opportunity to be heard.' . . .”

T. R. p. 76.

“... The Court. It certainly is *res judicata* in that in principle this is a proper tax to be paid to the proper officials of the local government. . .”

T. R. pp. 78-79.

“... The original complaint and the amended complaint represent nothing more than a continuance on the part of some delinquent taxpayers to defeat the Congressional purpose of Section 31 of the Organic Act of Guam. Regardless of any initial confusion as to the application of that provision, the determination of the courts is that the effect of Section 31 is to impose a territorial tax measured by the tax which the same individual would have to pay in the continental United States; that of necessity the Congress does not levy taxes unless it expects them to be collected, but in using the phrase ‘income tax laws’ it meant to do more than to levy a tax; that it intended to vest in the proper collection officials those machineries for collection which are essential to the obtaining of tax funds; that it has been the policy of the United States government for many years to impose the pay-as-you-go plan of income tax collection and as part of that collection method, it has required employers to withhold taxes and in turn has protected employers who withheld and paid taxes to the proper officials by denying the courts any right to interfere with them and requiring the aggrieved taxpayer to follow the administrative procedures. That is what has been done in Guam. . . .”

T. R. pp. 79-80.

“... There is no showing here that the taxpayer has in any way been injured except that he is denied the assistance of the court in evading his tax responsibility. Nothing more. If he is not evading his tax responsibility then his remedy is against the collector who has received the withheld taxes. This complaint is again typical of almost impertinent type of pleading in which the pleader again infers that the tax collector is some kind of imposter, some person who alleges that he holds the position; attempting to surround the pleading with an impression that we are dealing here with a number of false public officials, people who pretend to act, people who pretend to to this . . .”

Appellants contend that these quotations from the hearing show that the District Court of Guam refused to consider anything as being before the Court except the question of the validity of the claimed territorial income tax; that the Court refused to consider, or even see, the question of breach of contract upon the part of the appellees; any question as to authority of the Government of Guam, or anyone else, to require withholding in Guam; the validity of the distraints and levies; the question of any delegation of authority by the Commissioner of Internal Revenue, or anyone else, with respect to the administration of any part of the Income Tax Laws of the United States. The Court clearly demonstrated that regardless of the pleadings, and admissions, the matter was a closed book, that there could be no merits

to the complaint; that every possible question with respect to this alleged income tax had been decided; and that appellants were wrong-doers who had no right to question any claim or asserted right put forth by any agents of the local Government.

Appellants believe that the deliberate avoidance of the points in the case and the determination of the matter based upon broad conclusions clearly shows that the Court did not consider the merits of the controversy but with the matter predetermined disposed of it in accordance with their views.

Therefore, the judgment should be reversed.

VII.

THE DISTRICT COURT OF GUAM ERRED IN CONSTRUING THE PERTINENT STATUTES OF THE UNITED STATES, DISREGARDED THE CANONS OF STATUTORY CONSTRUCTION, ASSUMED AS PROVEN FACTS NOT IN EXISTENCE, DISREGARDED THE CLEAR LACK OF ANY AUTHORITY IN THE AGENTS OF THE GOVERNMENT OF GUAM, AND UPON SUCH ERRORS ENTERED SUMMARY JUDGMENT CONTRARY TO BOTH THE LAW AND THE FACTS.

This action, commenced as an action for damages for breach of employment contracts, damages and other relief was converted by appellees, defendants below, into an action to determine the construction of portions of the Organic Act of Guam and the determination of the existence of the alleged territorial income tax. The District Court of Guam so

considered this action and disposed of it upon that basis. Appellants believe, therefore, that the complete grounds and basis for such determination is open for review and may properly be analyzed and discussed. That it is proper to consider, to examine and test the foundation upon which this judgment must be resting. Appellants believe that if this judgment is based upon an error of law or fact that it must fall and are confident that such is clearly evident in the record of this action.

Appellees caused to be filed in support of their motion to dismiss and for summary judgment an affidavit of Mr. Marshall, together with supporting exhibits. Appellants concede that Mr. Marshall did accurately relate clearly and correctly all the facts which are material. The status of the appellees within Guam, their work, the employment of appellants, the receipt of the levies and warrants of distraint, their withholding of pay as authorized by United States tax withholding forms executed by appellants, and the turning over to agents of the Government of Guam of the sums withheld from appellants' pay upon the demand of agents of Guam.

Appellants concede that the alleged warrants of distraint, the levies, their employment contracts and United States withholding forms are correct.

Appellants do not concur in the conclusion of the affidavit, that the action of appellees was lawful, that it was in response to lawful authority, or that there is any justification in law for the actions of appellees.

Appellants wish to make clear their position that they executed Federal withholding forms authorizing withholding for Federal taxes due, if any, and for no other purpose. That they believe the plain text of the Organic Act of Guam does not create a local tax but does confer upon the territorial Government the proceeds of any Federal taxes derived from Guam, and that lacking any statutory authority or delegation no local official possesses any legal right, duty or authority to perform any actions in connection with income tax, and therefore, all acts of such officers as set forth in the affidavit of Mr. Marshall are unwarranted and constitute no valid defense to appellees.

Appellants therefore assert that we can properly analyze the findings, expressed or implied, upon which of necessity the District Court of Guam based its decision; that the judgment in this case must fall if there is lacking one essential element required to support it.

Taking the foundation in logical order, as we believe we must, the first step is the alleged territorial tax. Appellants deem it clear that the District Court of Guam holds that there exists in Section 31 of the Organic Act (1421i T 48 U.S.C.A.) a separate and distinct local income tax, similar in text to the Federal, though changed in certain respects.

The District Court of Guam in reaching this conclusion, we submit, ignored the canons of statutory construction, and is either legislating judicially or accepting the executive legislative acts of the Gov-

ernment of Guam. The District Court of Guam further ignores the provisions and plain meaning of Section 30 of the Organic Act of Guam (1421h T 48 U.S.C.A.). It is believed that both sections should be read together, the one by its plain text extends the Federal income tax statutes to embrace Guam; the other giving to the local Government the proceeds of Federal taxes, no mention being made of local taxes.

We submit that the first canon of construction must be applied—that the intent of Congress must be sought first in the text, that if it is clear and workable no further construction is either necessary or permitted. In this case, we submit that the plain meaning of the text of the statute is that Guam is to receive all monies derived by the United States from Guam, including income taxes (Section 30), that the United States income tax laws do apply and are in force in Guam. Surely that is what the simple text says. It does not mention any tax, other than Federal.

62 Cases of Jam v. United States, 95 L Ed 566.

“ . . . But our problem is to construe what Congress has written. After all, Congress expresses its purpose by words. It is for us to ascertain—neither to add nor to subtract, neither to delete or to distort . . . ”

Helvering v. City Bank Farmers Trust Co., 80 L Ed 63 (296 US 85-92).

“ . . . We are not at liberty to construe language so plain as to need no construction, or to refer to Committee reports where there can be no doubt of

the meaning of the words used. The section applies to this transfer . . .”

Helvering v. San Joaquin Fruit & Invest. Co.,

80 L Ed 824 (297 US 496-500).

“ . . . Language used in tax statutes should be read in the ordinary and natural sense . . .”

United States v. Public Utilities Commission,

97 L Ed 1020.

“ . . . Where the language and purpose of the questioned statute is clear, courts, of course, follow the legislative direction in interpretation . . .”

Osaka Shosen Kaisha Line v. United States,

81 L Ed 532.

“ . . . This we are not at liberty to do under the guise of construction, because, as this court has so often held, where the words are plain there is no room for construction . . .”

Helvering v. New York Trust Co., 78 L Ed 1361

(292 US 455-473).

“ . . . The rule that where the statute contains no ambiguity, it must be taken literally and given effect according to its language is a sound one not to be put aside to avoid hardships that may sometimes result from giving effect to the legislative purpose . . .”

Slough v. Comm. of Internal Revenue, 147 F

2d 836.

“ . . . But where the language of an enactment is clear, and construction according to its terms does not lead to absurd or impracticable conse-

quence, the words employed are to be taken as final expression of the meaning intended. And in such cases legislative history may not be used to support a construction that adds to or takes from the significance of the words employed . . . We adhere to the view that common sense interpretation is the safest rule to follow in the administration of income tax laws. *Rhodes v. Comm. of In. Rev.* 6 Cir., 100 F 2d 966, 969. . . .”

Clearly based upon the authority of these cases the Organic Act plainly, with no need for construction, provides that Federal income taxes are in force in Guam. Nowhere does it mention a local income tax.

What is the text of the income tax law in force in Guam pursuant to the Organic Act? The entire text of the United States income tax laws are expressly incorporated by reference in Section 31 of the Organic Act (1421i T 48 U.S.C.A.).

Hecht v. Malley, 68 L Ed 949 (265 US 144-164).

“. . . In adopting the language used in an earlier act, Congress must be considered to have adopted also the construction given by this court to such language, and made it a part of the enactment. *Sessions v. Romadka*, 145 U.S. 29, 43, 36 L. ed 609, 614, 12 Sup Ct Rep 799; *Latimer v. United States*, 223 U.S. 501, 504, 56 L ed 526, 527, 32 Sup Ct Rep 242 . . . Nor does the language of the act in this respect call for the application of the established rule that, in the interpretation of statutes levying taxes, their provisions are not to be extended by implication beyond the clear import of the language used, and in case of doubt are to be construed most strongly against the

government and in favor of the taxpayer. *Gould v. Gould*, 245 US 151, 153, 62 L ed 211, 213, 38 Sup Ct Rep 53; *United States v. Merriam*, 263 US 179, 187, ante, 240, 44 Sup Ct Rep 69. Here the language of the act is specific, leaving no substantial doubt as to its meaning; and the taxpayers are seeking by implication to limit its clear import . . .”

Shapiro v. United States, 92 L Ed 1787.

“ . . . in adopting the language used in the earlier act, Congress ‘must be considered to have adopted also the construction given by this Court to such language, and made it a part of the enactment’ . . .”

Henrietta Mining & M. Co. v. Gardner, 172 U.S., 43 L Ed 637.

“The language of paragraph 40, as amended in 1891, having been taken from the California Code, it is presumed that it was taken with the meaning it had there, and hence we hold it worked a repeal of paragraph 42 of the Revised Statutes of Arizona of 1887; and *the judgment of the Supreme Court of the Territory is reversed* and the cause remanded for further proceedings in accordance with this opinion . . .”

Thus, having within the Organic Act the entire text of the income tax laws of the United States do we not have an entire system, long in force and tested by the courts of the United States in innumerable decisions. We contend that under the canons of construction all doubts and questions must not be solved by implication or by any other means than the text

of the income tax laws of the United States and the Federal decisions interpreting these laws. That when either the Government of Guam, or anyone else except the Congress, attempts to alter one word of the plain text of the income tax laws of the United States as contained in Section 30 of the Organic Act (1421i T 48, U.S.C.A.) it is the exercising of a legislative function and is neither the construction of a statute nor the resolution of an ambiguity but the unlawful exercise of the law-making power, and is void.

Meriwether v. Garrett, US 102, 26 L Ed 197.
 “. . . It has no elements of one. It is a high act of sovereignty, to be performed only by the Legislature upon considerations of policy, necessity and the public welfare. In the distribution of the powers of government in this country into three departments, the power of taxation falls to the legislative. It belongs to that department to determine what measures shall be taken for the public welfare, and to provide the revenues for the support and due administration of the government throughout the State and in all its subdivisions. Having the sole power to authorize the tax, it must equally possess the sole power to prescribe the means by which the tax shall be collected, and to designate the officers through whom its will shall be enforced . . .”

Springer v. Philippine Islands, 72 L Ed 845
 (US 189-212).

“. . . Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The

latter are executive functions. It is unnecessary to enlarge further upon the general subject, since it has so recently received the full consideration of this court. *Mayers v. United States*, 272 US 52, 71 L ed 160, 47 Sup Ct Rep 21 . . .”

Preston v. Sturgis Milling Co., 183 F. 3.

“ . . . Before stating more in detail than above the grounds upon which it is claimed that appellant is entitled to the relief which he sought, we desire to make good the fundamental principle which underlies the lower court’s decision and to indicate its scope. That principle is that the power of taxation is legislative and cannot be exercised otherwise than under legislative authority. . . .”

Haskins Bros. & Co. v. Morgenthau, 85 F 2d 677.

“ . . . But, as we have already pointed out, what is sought here is to compel the court to assume the legislative and executive authority of the United States and in effect enact a law to restrain and control the use of money in the treasury and direct the officers of the government to carry it into execution. This may not be done. *Belknap v. Schild*, 161 US 10, at page 18, 16 S Ct, 443, 40 L Ed 599. . . .”

Yet the Government of Guam and the District Court of Guam has assumed, by interpretation allegedly from necessary implication, to violate this rule and held that the plain text of the income tax law contained in the Organic Act of Guam is different than the text as published in T 26, U.S.C.A.

The statute is clear as to who is the official charged with the authority to administer and enforce the act. The Commissioner of Internal Revenue of the United States. Nowhere in the text of the Organic Act is to be found any authority from the Congress to alter or substitute. To no official is delegated such power or authority. The cases are clear and must be followed.

United States v. Stewart, 85 L Ed 40.

“ . . . It is likewise true that Congress will be presumed to have used a word in its usual and well-settled sense. *Old Colony R Co. v. Commissioner of Internal Revenue*, 284 US 552, 76 L ed 484, 52 S Ct 211; *Deputy v. De Pont*, 308 US 488, 84 L ed 416, 60 S Ct 363. But §26 does not exempt simply ‘income;’ it exempts the bonds and the ‘income derived therefrom’ . . . ”

MacKenzie v. United States, 109 F 2d 540.

“ . . . The federal tax lien is entirely statutory, therefore its scope and effect are to be determined solely by the statute and the decisions interpreting it. The statute creating the lien is Section 3186 of the Revised Statutes, as amended, 26 U.S.C.A. §§1560, 1561, 1562, which read during the period involved herein . . . ”

United States v. Field, 65 L Ed 617 (US 256, 257).

“ . . . Applying the accepted canon that the provisions of such acts are not to be extended by implication (*Gould v. Gould*, 245 US 151, 153, 62 L ed 211, 213, 38 Sup Ct Rep 53), we are con-

strained to the view—notwithstanding the administrative construction adopted by the Treasury Department—that the Revenue Act of 1916 did not impose an estate tax upon property passing under a testamentary execution of a general power of appointment . . .”

Federal Trade Com. v. A.P.W. Paper Co., 90 L Ed 1165 (328 US 193-204).

“ . . . We cannot lightly infer that this specific right was intended to be swept away under the 1938 Commission Act. Repeals by implication are not favored. Yet if the order of the Commission stands, the right granted or recognized by the 1910 Act becomes a nullity . . .”

Helvering v. Stockholms Enskilda Bank, 79 L Ed 211.

“ . . . In the foregoing discussion, we have not been unmindful of the rule, frequently stated by this court, that taxing acts ‘are not to be extended by implication beyond the clear import of the language used,’ and that doubts are to be resolved against the government and in favor of the taxpayer . . .”

Ex Parte Endo, 89 L Ed 243.

“ . . . We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used. . . .”

Morrill v. Jones, 27 L Ed 267.

“... The Secretary of the treasury cannot, by his regulations, alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted ...”

Helvering v. Griffiths, 87 L Ed 843 (318 US 371-411).

“... Under our judicial tradition we do not decide whether a tax may constitutionally be laid until we find that Congress has laid it. Unless the tax asserted by the Commissioner has been authorized by Congress, it fails of validity before we even reach the constitutional question. To reach that question we must decide whether Congress intended by §115 (f) (1) to do what *Eisner v. Macomber* squarely held that it could not. We cannot find that it did ...”

The officers of the Government of Guam have no power or authority to administer this Act. Such a power cannot be assumed and can only be created by legislative action.

Atchison, T. & S. F. Ry. Co. v. Elephant Butte Irr. Dist., 110 F 2d 767.

“... (5) An assessment can be made only by an official or board designated by law to make it. An attempted assessment by any other person or board is void ...”

Stark v. Wickard, 88 L Ed 748.

“... When Congress passes an Act empowering administrative agencies to carry on governmental

activities, the power of those agencies is circumscribed by the authority granted. This permits the courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect justifiable individual rights against administrative action fairly beyond the granted powers. The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction. Cf *United States v. Morgan*, 307 US 183, 190, 191, 83 L ed 1211, 1216, 1217, 59 S Ct 795.”

Federal Trade Commission v. Raladam Co.,
75 L Ed 1330.

“... Official powers cannot be extended beyond the terms and necessary implications of the grant. If broader powers be desirable, they must be conferred by Congress. They cannot be merely assumed by administrative officers; nor can they be created by the courts in the proper exercise of their judicial functions ...”

J. P. Stevens Engraving Co. v. United States,
44 F 2d 822.

“... The tax officers can proceed only by virtue of the statutes, and must proceed strictly according to them ...”

The authority of these officers who signed the warrants of distraint, the levies, and received the monies is neither contained in the statute nor has it been delegated to them by any competent authority. Such delegation is forbidden to the Commissioner. It has

not been done by Congress. Therefore, their assumed powers must be void.

Joy Floral Co. v. Commissioner of Int. Rev.,
29 F 2d 865.

“... The powers of the Commissioner, it may be noted, are purely statutory, and must be construed accordingly ...”

Toledo, P U W.R.R. v. Stover, 60 F Supp 587.

“... The executive department of our government cannot exceed the powers granted to it by the Constitution and the Congress, and if it does exercise a power not granted to it, or attempts to exercise a power in a manner not authorized by statutory enactment, such executive act is of no legal effect ...”

The Legislature of Guam has enacted no statute with reference to this, or any other income tax law, and has not authorized or created any offices to administer this alleged tax. This is a matter which the District Court of Guam should have judicially known. Without such authority from the Legislature their acts are void. Only the lawmaking power can create an office. This it has not done.

Youngstown Sheet and Tube Co. v. Sawyer,
96 L Ed 1169.

“... The nature of that authority has for me been comprehensively indicated by Mr. Justice Holmes. ‘The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power’ ...”

Goshnower v. United States, 63 L Ed 328 (248 US).

“ . . . Primarily we may say that the creation of offices and the assignment of their compensation is a legislative function. *Glavey v. United States*, 182 US 595, 45 L ed 1347, 21 Sup Ct Rep 891; *United States v. Andrews*, 240 US 90, 60 L ed 541, 36 Sup Ct Rep 349. And we think the delegation of such function and the extent of its delegation must have clear expression or implication . . . ”

The Congress of the United States, except as to the unaltered text of the income tax laws has not provided any standards; or, if, as the District Court of Guam holds, there is a territorial tax it is void for lack of standards. The standards for the United States income tax cannot be the ones for another tax of a different text.

United States v. Wright, 48 F Supp 687.

“ . . . The act, as amended, meets the proper tests in deciding the question of delegation: (1) The statute contains a clear statement of the policy and purpose which Congress seeks to accomplish; and (2) it contains an intelligible statement of the standards by which that purpose is to be worked out. . . . ”

Panama Refining Co. v. Ryan, 79 L Ed 446.

“ . . . Accordingly, we look to the statute to see whether the Congress has declared a policy with respect to that subject; whether the Congress has required any finding by the President in the ex-

ercise of the authority to enact the prohibition . . .”

Carlson v. Landon, 96 L Ed 547.

“ . . . B. Delegation of Legislative Power—This leaves for consideration the constitutionality of this delegation of authority. We consider first the objection to the alleged unbridled delegation of legislative power in that the Attorney General is left without standards to determine when to admit to bail and when to detain. It is familiar law that in such an examination the entire Act is to be looked at and the meaning of the words determined by their surroundings and connections. Congress can only legislate so far as is reasonable and practicable, and must leave to executive officers the authority to accomplish its purpose.”

The income tax found by the District Court of Guam to exist is vague and ambiguous since its text has not been published. If the text varies and it has been held by the District Court of Guam to vary from the text of the United States Statute how is any person to know how and in what manner it applies to him?

Ebert v. Poston, 69 L Ed 435.

“ . . . We have no occasion to state them. The judicial function to be exercised in construing a statute is limited to ascertaining the intention of the legislature therein expressed. A casus omissus does not justify judicial legislation. Compare *United States v. Weitzel*, 246 U.S. 533, 543, 62 L ed 872, 874, 38 Sup Ct Rep 381 . . .”

United States v. Five Gambling Devices, 98 L Ed 179.

“... The Act gives no hint as to where the ‘district’ is or how a person can locate it. It never describes any ‘district’. Yet failure to comply with these unascertainable requirements is punishable by fine up to \$5,000, imprisonment up to two years, or both. This punishment, at least, is certain. I would apply the established rule that ‘a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law’. *Connally v. General Constr. Co.*, 269 US 385, 391, 70 L ed 322, 328, 46 S Ct 141 . . .”

The alleged territorial income tax, held by the District Court of Guam to exist violates the principle that taxing statutes shall not be altered, amended or extended except by clear command of the lawmaking body. This the alleged territorial income tax, as claimed to exist, violates.

A statute cannot be repealed by implication. The claimed territorial income tax law of Guam as found by the District Court of Guam repeals by implication Section 251 of the Revenue Act of 1939, now 931 of the Revenue Act of 1954. Yet there is nothing in the text of the Organic Act to warrant this.

United States v. 200 Barrels of Whiskey, 24 L Ed 491, (95 US 571-576).

“... The rules and regulation which the Commissioner of Internal Revenue is authorized by

section 2 to prescribe cannot have the effect of bringing the case under the operation of the penalty provided in section 96, if it was already covered by section 57. The regulations of the Department cannot have the effect of amending the law. They may aid in carrying the law as it exists into execution, but they cannot change its positive provisions.”

Iselin v. United States, 70 L Ed 566 (270 US 245-251).

“ . . . The statute was evidently drawn with care. Its language is plain and unambiguous. What the government asks is not a construction of the statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function. Compare *United States v. Weitzel*, 246 US 533, 543, 62 L ed 872, 874, 38 Sup Ct Rep 381; *Peoria & P.U.R. Co. v. United States*, 263 US 528, 534, 535, 68 L ed 427, 430, 431, 44 Sup Ct Rep 194 . . . ”

Southeastern Alaska Mining Corporation v. Zavodsky, 60 F 2d 24.

“ . . . It is a most ordinary rule of statutory construction that repeals by implication are not favored, and that a statute dealing with a particular subject is not modified by a later enactment which may, by its provisions, enlarge remedies which are by the first act restricted. It seems unnecessary to cite authorities to this point, because the rule adverted to is elementary. . . ”

United States v. Burroughs, 77 L ed 1096 (289 US 159-165).

“ . . . The implied repeals are not favored, and if effect can reasonably be given to both statutes the presumption is that the earlier is intended to remain in force. . . . ”

The acts of the agents of the Government of Guam and of the appellees as set forth in the affidavit of Mr. Marshall being acts of unauthorized agents, without legally delegated power and holding an office the powers of which have not been granted by the Legislature clearly violated the provision of IV and V Amendment of the Constitution and the Bill of Rights of Guam, Section 1421b T 48, U.S.C.A.

Cross v. Georgia Iron & Coal Co., 250 Fed Rep, p. 439.

“ . . . An assessment of property for taxation can be validly made only by an official or body designated by law to make it. *Cooley on Taxation* . . . ”

Miller Brothers Company v. Maryland, 98 L Ed 745.

“ . . . It is a venerable if trite observation that seizure of property by the state under pretext of taxation when there is no jurisdiction or power to tax is simple confiscation and a denial of due process of law. ‘No principle is better settled than that the power of a State, even its power of taxation, in respect to property, is limited to such as is within its jurisdiction.’ *New York, L. E. & W. R. Co. v. Pennsylvania*, 153 US 628, 646, 38 L ed 846, 853, 14 S Ct 952. . . . ”

The amending of a statute of the United States by executive or judicial action violates the provisions of Article I, Section 1, of the Constitution. This clearly has been done and approved by the District Court of Guam.

The creating of a tax by implication and by executive construction as herein approved by the District Court of Guam violates the provision of Article I, Section 8 of the Constitution.

Title 26, U.S.C.A. specifically incorporated into Section 31 of the Organic Act (the income tax law portion) specifies how taxes may be, and shall be assessed, and by whom. In the absence of a valid assessment there is no tax and all actions to collect the same are void. Herein it is admitted that the Commissioner of Internal Revenue of the United States did not assess this tax.

Atchison, T. & S. F. Ry Co. v. Elephant Butte Irr. Dist., 110 F 2d 767.

“ . . . (5) Assessment can be made only by an official or board designated by law to make it. An attempted assessment by any other person or board is void . . . ”

Since taxing, as well as other statutes, can only be amended by legislative action the necessary changes claimed to have been made to the text can only be sustained upon the theory that interpretive instructions are not only necessary but have been authorized. This power must be expressly conferred and, if conferred, when exercised must be published. Wherein

has it been granted; to whom; and what are the limits for its exercise? None is contained in the Organic Act and any court may notice that the only grant in Title 26, U.S.C.A. is to certain enumerated Federal officers. Thus, clearly, the exercise of the assumed authority to construe claimed by and for agents of Guam is in error. Incidentally, even if it exists, which we cannot concede, it has not been validly exercised and, these interpretations exist entirely in dicta by the District Court of Guam in various actions.

St. Louis Merchants' Bridge T. Ry. Co. v. United States, 188 Fed Rep 191.

“ . . . A legislative body may delegate the power to find some fact or situation on which the operation of a law is conditioned, or to make and enforce regulations for the execution of a statute according to its terms. *Union Bridge Co v. United States*, 204 US 364, 386, 27 Sup Ct 367, 51 L ed 523; *Marshall Field & Co v. Clark*, 143 US 649, 677, 693, 694, 12 Sup Ct 495, 36 L Ed 294; *Caha v. United States*, 152 US 211, 218, 219, 14 Sup Ct 513, 38 L ed 415; *St. Louis & I.M. Ry. v. Taylor*, 210 US 281, 287, 28 Sup Ct 616, 52 L ed 1061; *Coopersville Co Operative Creamery Co. v. Lemon*, 163 Fed 145, 147, 89 C.C.A. 595.

But it cannot delegate its legislative power, its power to exercise the indispensable discretion to make, to add to, to take from, or to modify the law. ‘The true distinction’, said Judge Ranney for the Supreme Court of Ohio in *Cincinnati, Wilmington & Zanesville RR Co v. Commissioners*, 1 Ohio St 77, 88, in a declaration which has been repeatedly approved by the Supreme Court,

‘is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done. To the latter no valid objection can be made . . .’

Hirabayashi v. United States, 87 L ed 1774 (320 US 81-114).

“... The essentials of the legislative function are preserved when Congress authorizes a statutory command to become operative, upon ascertainment of a basic conclusion of fact by a designated representative of the Government. Cf. *The Aurora v. United States*, 7 Cranch (US) 382, 3 L ed, 378; *United States v. Chemical Foundation* . . .”

Hotch v. United States, 212 F 2d 280.

“... The Congressional directive in regard to the procedure to be followed in the issuance of agency regulations must be strictly complied with, since the issuance of regulations is in effect an exercise of delegated legislative power . . .”

Thus, appellants contend that the District Court of Guam could not have entered summary judgment for appellees in this case without finding that there is a separate and distinct territorial income tax law. That its text differs from the text of the income tax law of the United States; that it is to be administered by local officers who were lawfully appointed and authorized to do so; that the Governor of

Guam has the authority to create such officers and determine their powers; that the claimed law is clear, unambiguous, and certain; possesses standards; that Congress did repeal Section 251 of the Internal Revenue Act of 1939 and Section 1621 (8) B of that Act; that there was no infringement of any rights guaranteed by the Constitution or the Organic Act of Guam.

All these facts must have been so held by the District Court of Guam for it to have entered this judgment.

We believe that we have conclusively demonstrated the many fundamental errors upon which this judgment was based and that, therefore, the District Court of Guam should be reversed.

CONCLUSION.

Appellants claim that they have clearly spelled out the numerous errors of the District Court of Guam; that this judgment being contrary to the law which governs this action, that the basis upon which the judgment rests being untenable the judgment must be reversed.

Dated: Agana, unincorporated territory of Guam,
20 October, 1955.

Respectfully submitted,

FINTON J. PHELAN, JR.,

Attorney for Appellants.

**In the United States Court of Appeals
for the Ninth Circuit**

**RICHARD C. LAMKIN AND ANTHONY B. SILVIA,
APPELLANTS**

v.

**BROWN AND ROOT, INC., PACIFIC BRIDGE COMPANY, INC.,
MAXON CONSTRUCTION COMPANY, INC., UTAH CON-
STRUCTION COMPANY, INC., AND SWINNERTON AND
WALLBERG, A CO-PARTNERSHIP, JOINT ADVENTURERS
DOING BUSINESS UNDER THE NAME OF BROWN-PACIFIC-
MAXON, APPELLEES**

**ON APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT
OF GUAM, TERRITORY OF GUAM**

BRIEF FOR THE APPELLEES

H. BRIAN HOLLAND,
Assistant Attorney General.

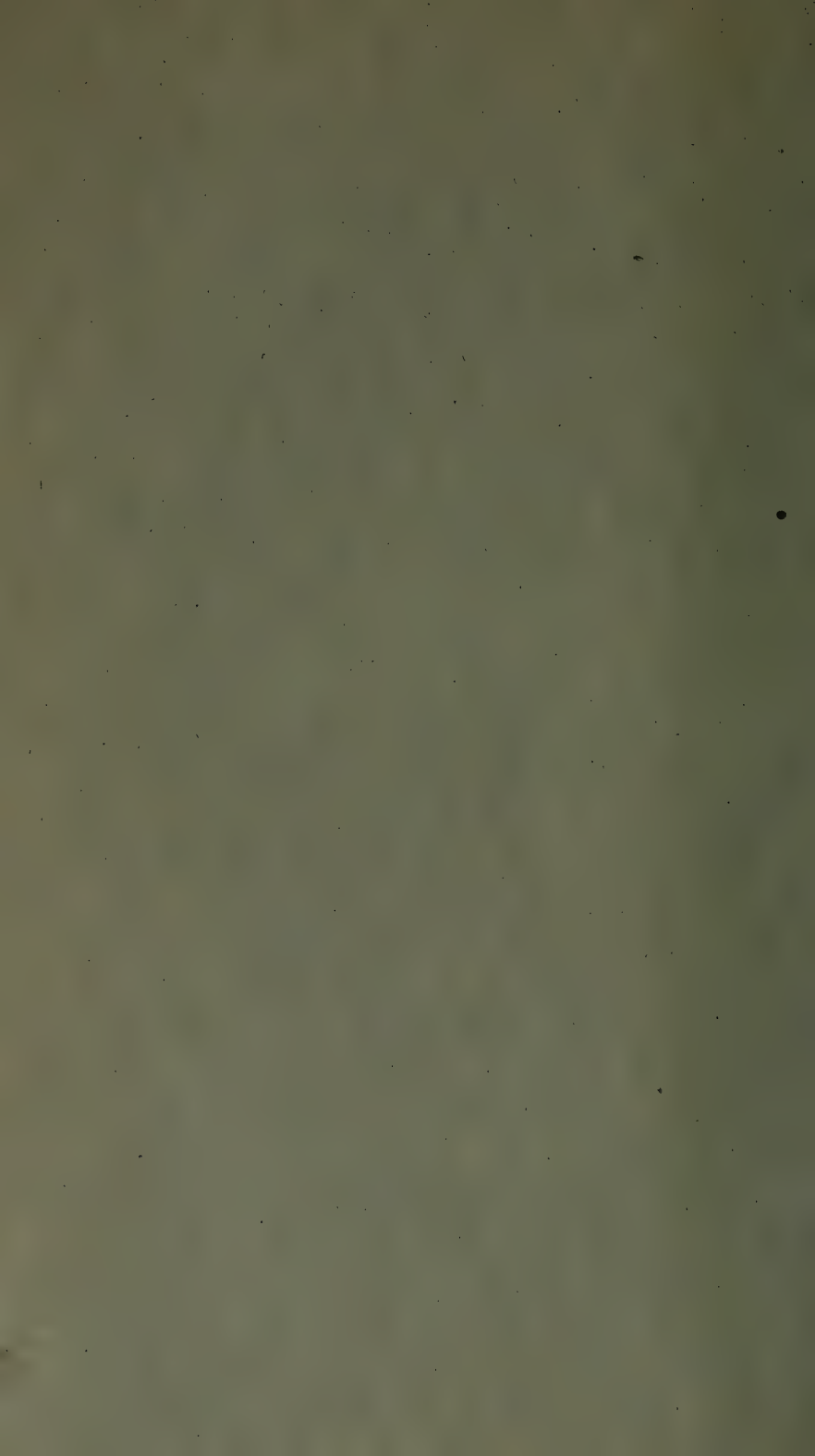
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**In the United States Court of Appeals
for the Ninth Circuit**

No. 14772

**RICHARD C. LAMKIN AND ANTHONY B. SILVIA,
APPELLANTS**

v.

**BROWN AND ROOT, INC., PACIFIC BRIDGE COMPANY, INC.,
MAXON CONSTRUCTION COMPANY, INC., UTAH CON-
STRUCTION COMPANY, INC., AND SWINNERTON AND
WALLBERG, A CO-PARTNERSHIP, JOINT ADVENTURERS
DOING BUSINESS UNDER THE NAME OF BROWN-PACIFIC-
MAXON, APPELLEES**

*ON APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT
OF GUAM, TERRITORY OF GUAM*

BRIEF FOR THE APPELLEES

OPINION BELOW

The opinion of the District Court, rendered orally at the hearing (R. 78-80), is not reported.

JURISDICTION

This is a suit brought by plaintiffs-appellants in the District Court of Guam, Territory of Guam, against their employers, the defendants-appellees, for the pur-

pose of enjoining appellees from complying with future levies issued by the Commissioner of Revenue and Taxation of the Government of Guam in collection of income taxes imposed by Congress in the Organic Act of Guam; for money judgment in favor of appellant Lamkin in the amount of \$504.26, representing wages due Lamkin paid over by appellees to the Government of Guam in compliance with past levies; for an injunction restraining appellees from withholding in the future sums from the wages of appellants and others of their employees in payment of the income tax imposed by the Organic Act of Guam; for an accounting to appellants and other of appellees' employees for sums heretofore withheld from their wages on account of the income tax since January 1, 1951; and for money damages in favor of each appellant respectively in the sum of \$25,000 by reason of alleged (R. 54) "deprivation" by appellees of appellants' "civil rights in violation of the provisions of Chapter 21, Title 42, U.S.C.A." (R. 3-10, 54-62.)

Appellant Lamkin is a citizen of Colorado and appellant Silvia of California. Both are employed on Guam by appellees who are joint adventurers engaged in the construction of military installations under contract with the United States. (R. 54.) Jurisdiction of the District Court exists by virtue of Section 22(a) of the Organic Act of Guam, c. 512, 64 Stat. 384 (48 U.S.C. 1952 ed., Sec. 1424(a)), (a) since the cause arises under the Organic Act of Guam and the Internal Revenue Codes of 1939 and 1954 and particularly involves the meaning and effect of Sections 30 and 31 of the Organic Act of Guam (48 U.S.C. 1952 ed., Sec. 1421h and 1421i) and, further (b), since this is a cause in Guam

jurisdiction over which has not been transferred by the legislature to any other court.

The instant suit was commenced by the filing of a complaint on October 28, 1954, and service of summons on October 30, 1954. (R. 68.) On February 17, 1955, the defendants-appellees filed a motion (1) to dismiss the action on the ground that the complaint failed to state a claim upon which relief could be granted and (2) for summary judgment for the defendants based on the complaint and an attached affidavit. (R. 12-13.) On February 17, 1955, notice was also given that the motion would be brought on for hearing on March 4, 1955. (R. 53, 69.) On March 3, 1955, appellants filed an amended complaint. (R. 69.) A hearing on the motion was held on March 4, 1955. (R. 71-80.) The District Court granted the motion for summary judgment and directed that the appellees prepare a form for judgment. (R. 80.) On March 15, 1955, the District Court entered the judgment, which ordered, adjudged and decreed that the appellees' motion for summary judgment be granted and that appellants recover nothing by their suit. (R. 63.)

Notice of appeal from this judgment was filed by appellants on April 13, 1955 (R. 65), in compliance with 28 U.S.C., Section 2107. Jurisdiction of this Court to hear and determine this appeal is conferred by 28 U.S.C., Sections 1291 and 1294, as amended by the Act of October 31, 1951, c. 655, 65 Stat. 710, 726, 727, Sections 48 and 50(a).

QUESTIONS PRESENTED

1. Whether or not a genuine issue exists under the record as to any material fact.

2. Whether as a matter of law the appellees-employers were required to pay to the Government of Guam sums distrained and withheld from taxpayers' wages.

3. Did the last minute amendment to the complaint defeat the motion for summary judgment?

STATUTES AND OTHER AUTHORITIES INVOLVED

The statutes and other authorities involved are set forth in the Appendix, *infra*.

STATEMENT

For the sake of clarity the plaintiffs-appellants are designated below as "taxpayers" and the defendants-appellees as "employers."

The complaint and amended complaint are substantially identical with the exception that the amended complaint adds a fourth count to the three counts of the original complaint.

The first count of both complaints is on behalf of taxpayer Lamkin and alleges that he was employed in 1952 under a contract by the employers to work on their project in Guam, that this contract continues in full force and that this taxpayer has fulfilled and continues to fulfill all the obligations of the contract. (R. 4, 54-55.) ¹

¹ The complaint here differs in immaterial detail from the amended complaint. The complaint alleges that the employment contract was executed at Ft. Collins, Colorado, in the month of December, 1952, and that taxpayer Lamkin was employed as an assistant mechanical superintendent to work in Guam. (R. 4.) The amended complaint alleges that the employment contract was executed at Denver, Colorado, on September 17, 1952, employing Lamkin as machinist general foreman to work in Guam. This contract was modified effective January 26, 1953, to read that this taxpayer was employed as an assistant office manager. (R. 54-55.)

Taxpayer Lamkin's gross income under the contract is \$184 a week; after certain authorized deductions the net weekly balance to be paid to him is \$142.54. (R. 4, 55.) In asserted violation of the contract the employers failed and refused to pay him the net balance of his wages for the weeks ending September 26, October 3, October 10 and October 17, 1954, in the total of \$573.16; on October 27, 1954, he was paid \$68.90, leaving a balance of \$504.26 claimed to be due and unpaid to him. (R. 4-5, 55-56.) Prior to the time the employers failed to make these payments to taxpayer Lamkin, he had received by mail numerous demands "purporting to be assessments of an income tax from one Harry L. Mangerich, claiming to be Commissioner of Revenue and Taxation for the Government of Guam, said demands being for the sum of Four Hundred Eighty Seven Dollars Fifty One Cents (\$487.51) plus interest." (R. 5, 56.) It is also alleged that the employers claimed to justify their purported violation of the contract terms by asserting that levies had been made by Mangerich on behalf of the Government of Guam upon taxpayer Lamkin's wages for income tax alleged to be due to the Government of Guam. (R. 5, 56-57.) Taxpayer Lamkin further avers in this first count that the purported levy by Mangerich is not authorized "by the Revenue Act of 1939 As Amended or the Revenue Act of 1954 of the United States or by any other statute of the United States" (R. 6); that taxpayer Lamkin is not indebted to the Government of Guam and has not authorized the employers to pay any money to Mangerich or the Government of Guam in his behalf; that the employers are indebted to taxpayer Lamkin in the sum of \$504.26 which they refuse to pay

“by reason of said purported assessment and levy” (R. 6, 57).

In the second count taxpayer Silvia alleges that he is employed by the employers pursuant to a contract still in force executed in November, 1948, to work on their project in Guam in a supervisory capacity, and that he has and continues to perform all his contract obligations. (R. 6-7, 57.)² It is alleged that taxpayer Silvia’s gross income under the contract is \$146.65 a week which, after certain authorized deductions are made, leaves \$109.65 to be paid him every week (R. 7, 57-58); that he is informed that the employers will on November 3, 1954, in violation of his employment contract, “confiscate” \$109.65, being his net wages, and further that the employers on November 10, 1954, will “confiscate” the same amount and on November 17, 1954, an undetermined sum (R. 7-8, 58). Taxpayer Silvia avers that he is informed that the employers intend “to pay such sums so confiscated from his wages to one Harry L. Mangerich, an employee of the Government of Guam, by reason of purported assessments and levies made by the said Harry L. Mangerich and served upon defendants” (R. 8, 58); that taxpayer Silvia is not indebted to the Government of Guam or Mangerich or to the employers in any amount, that he has no adequate remedy at law “to prevent the total confiscation and dissipation of his wages as set forth above” (R. 8, 58-59); that unless the employers are

² The complaint here differs in immaterial detail from the amended complaint. The complaint alleges that the contract was executed at San Francisco, California, in the month of November, 1948 (R. 6), which the amended complaint corrects to read as executed at Amesbury, Massachusetts, on November 15, 1948 (R. 57).

enjoined from "performing the acts of confiscation hereinabove described, plaintiff will be deprived of the fruits of his labor without due process of law" (R. 8, 59).

The third count is by both taxpayers and others similarly situated. It alleges that since January 1, 1951, the employers have withheld various sums from the wages of taxpayers and other employees of the employers and will withhold such sums in the future in accordance with withholding tables "provided in Section 1622(a)-(d), (g)-(k) of the United States Revenue Act of 1939 As Amended and Section 3402 of the United States Revenue Act of 1954, said withholding not having been authorized by plaintiffs."³ (R. 9, 59.)

It is asserted that this withholding is contrary to "Section 1621 of the United States Revenue Act of 1939 As Amended" (R. 9, 59-60) and "Section 3401 of the United States Revenue Act of 1954" (R. 9, 60). It is also alleged that by reason of these "wrongful" acts of the employers (R. 9, 60), taxpayers and others have had and will have substantial sums unlawfully withheld from their wages and since numerous employees of the employers have been subjected to these purportedly wrongful and illegal withholdings, a multiplicity of suits to protect and secure their rights would be required and therefore taxpayers and others have no adequate remedy at law (R. 9, 60).

The fourth count is contained only in the amended complaint and is on behalf of both taxpayers and others similarly situated. It commences by realleging all the

³The amended complaint adds "except for taxes to be withheld and paid to the United States of America." (R. 59.)

allegations of the first and third counts and adds that the employers (R. 60-61)—

conspiring with one Harry L. Mangerich, who claims to be a duly appointed Commissioner of Revenue and Taxation of the unincorporated territory of Guam, and other officials of the Government of Guam unknown to plaintiffs, did wilfully deprive plaintiffs and others of a civil right guaranteed to them by the Constitution and laws of the United States of America and the Organic Act of Guam, to wit: their property has been confiscated without due process of law contrary to the express provisions of Title 26, U.S.C.A.; that defendants, acting in concert with the said Harry L. Mangerich and others, under color of statutory law and regulations of the United States of America and the unincorporated territory of Guam, did deprive plaintiffs and others of their property and right to property as hereinbefore alleged, to the damage of each plaintiff in the sum of Twenty Five Thousand Dollars (\$25,000.00).

On the basis of these four counts taxpayers demand the following relief: Taxpayer Lamkin demands money judgment for \$504.26 with interest and for \$25,000 and for an injunction restraining further alleged confiscation of his wages and further withholdings from his wages and those of others and that the employers be required to account for and repay to taxpayer Lamkin and others sums withheld from their wages since January 1, 1951. (R. 9-10, 61-62.)

Taxpayer Silvia demands money judgment for \$25,000 and that the employers be enjoined from confiscat-

ing his wages as threatened and from further withholdings from his wages and those of others and that the employers be required to account for and repay to him and others sums withheld from their wages since January 1, 1951. (R. 10, 62.)

The employers did not answer the complaint, but instead moved (1) to dismiss the action because the complaint fails to state a claim upon which relief can be granted and (2) to enter summary judgment for the defendants on the ground that the complaint and an affidavit attached to the motion show that there is no material question of fact before the court and that the employers are entitled to judgment as a matter of law. (R. 12-13.) The affidavit attached to the motion for summary judgment was made by J. Russell Marshall who states that since April 1, 1954, he has been employed by the employers as "Project Manager," and as such is in charge of the management of the employers' affairs in Guam; that the exclusive activity of the employers within Guam is the construction of military installations upon military reservations pursuant to a cost-plus-fixed-fee contract between the employers and the Department of the Navy (R. 14); that of thousands of persons employed for this purpose, the employers employed taxpayer Lamkin on September 17, 1952, at Denver, Colorado, by a written contract, which was modified in writing on January 24, 1953 (R. 14-15). Copies of the contract of employment and its modification are annexed to Mr. Marshall's affidavit marked Exhibit A (R. 19-33) and Exhibit B (R. 33-37). Mr. Marshall further deposes that, at all times during taxpayer Lamkin's employment, the employers have "regularly deducted income tax withholdings as pro-

vided by the United States Internal Revenue Codes and Regulations and has paid such sums withheld over to the Treasurer of the Government of Guam," and that "the employer has followed a like procedure covering Guam earnings in the instance of all other employees employed on Guam under the same or similar conditions." (R. 15.) Exhibit C attached to the affidavit is a copy of a withholding exemption certificate executed by taxpayer Lamkin, dated November 20, 1952. (R. 37-38.)

Mr. Marshall's affidavit further sets forth that on September 1, 1950, the employers entered into a similar written contract of employment with taxpayer Silvia, a copy of which, attached to the affidavit, is marked Exhibit D. (R. 15, 38-40.) A withholding exemption certificate was executed by taxpayer Silvia dated December 15, 1950, attached as Exhibit E. (R. 40-41.)

The affidavit continues that on September 30, 1954, a warrant for distraint and levy covering taxpayer Lamkin's wages was served on the employers setting forth that taxpayer Lamkin was indebted to the Government of Guam for unpaid income taxes in the sum of \$503.35 and pursuant thereto the employers distrained \$142.54 from wages then due and owing to taxpayer Lamkin. (R. 16.) A copy of this warrant for distraint and levy is annexed to the affidavit marked Exhibit F. (R. 41-43.) Mr. Marshall further deposes that on October 7, 1954, the employers were served with a subsequent levy by the Commissioner of Revenue and Taxation for the Government of Guam in the amount of \$361.22 pursuant to which the employers distrained \$145.54 from taxpayer Lamkin's wages. (R. 16-17.) A copy of the warrant for distraint and

levy attached to the affidavit is marked Exhibit G. (R. 44-46.) Similar levies were made on October 14 and 22, 1954, copies of which are attached to the affidavit as Exhibits H and I. (R. 17, 46-48.) The total amount distrained by reason of these warrants and levies was \$573.16, from which however the employers have been authorized by the Commissioner of Revenue and Taxation to release \$68.90. Accordingly, the employers have paid over to the Government of Guam the net amount of \$504.26. (R. 17.)

At a time subsequent to the filing of the instant suit, namely, on November 18, 1954, the employers were served with a warrant for distraint and levy by the insular Commissioner of Revenue and Taxation setting forth that taxpayer Silvia was indebted to Guam in the amount of \$221.66 and pursuant thereto distrained \$89.50 from wages then due him. (R. 17-18.) A copy of this warrant and levy is attached as Exhibit J. (R. 48-51.) Other levies were served on the employers by the Commissioner of Revenue and Taxation on November 26, and December 2, 1954, respectively, copies of which are attached to the affidavit as Exhibits K and L. (R. 18, 51-53.) In compliance with these warrants for distraint and levies the employers in all distrained and paid over to the Government of Guam the total sum of \$221.85. (R. 18.)

The affidavit concludes that the employers have been advised and verily believe that their actions in the premises were lawful and in response to lawful authority and that they intend to continue so to act until such time as they are by law commanded to act otherwise. (R. 18-19.)

The motion for summary judgment, Mr. Marshall's

attached affidavit and the exhibits forming part of the affidavit were all filed and served on February 17, 1955. (R. 53, 69.) Notice that the motion would be brought on for hearing on March 4, 1955, with acknowledgement of service attached was also filed on February 17, 1955. (R. 53, 69.) On the day preceding the hearing, namely on March 3, 1955, taxpayers filed the amended complaint. (R. 62, 69.) The hearing was held on March 4, 1955, and the motion for summary judgment granted. (R. 71-80.) The court found that the employers were entitled to summary judgment as a matter of law and entered judgment on March 15, 1955, in their favor and that taxpayers recover nothing by their suit. (R. 63.) The instant appeal followed. (R. 65.)

SUMMARY OF ARGUMENT

1. The record establishes that no genuine issue exists as to any material fact. There is no dispute as to the employment contracts, performance of personal services by taxpayers in Guam, the amounts owed to taxpayers for wages under the contracts, the part of these wages which were withheld and paid to the Government of Guam, the receipt of the warrants for distraint and levies and the payments in response to these made by the employers to the Government of Guam. The only question remaining is whether or not the employers were correct in concluding that these payments to the Government of Guam were required as a matter of law.

2. Taxpayers do not complain that the amount of tax distrained and withheld from their wages is more than the statute requires or is otherwise incorrect. Their claim is solely and completely that there is no territorial income tax as a matter of law and hence that no valid collections could have been made under it.

However, in thus contending taxpayers choose to ignore the recent decision of this Court which directly rules adversely to their position here. *Laguana v. Ansell*, 212 F. 2d 207, affirming *per curiam* the decision of the District Court of Guam for the reasons given in its opinion (102 F. Supp. 919), certiorari denied, 348 U.S. 830. In substance taxpayers' effort here is to obtain a holding by this Court overruling its recent decisions directly in point. The *Laguana* case correctly holds that Congress intended persons such as taxpayers, who earn income for personal services on Guam, to pay an income tax imposed by Sections 30 and 31 of the Organic Act of Guam to sustain the territorial Government within whose jurisdiction and under whose protection the income is derived.

Further support for this construction of Section 31 of the Organic Act, adopted by this Court in the *Laguana* case and by the court below here is supplied by its legislative history and administrative construction and by the legislative history and long-standing administrative construction of substantially identical provisions for the Virgin Islands from which Section 31 derives.

Section 31 was obviously designed to change the prior law. Under taxpayers' argument, however, there would be no change; a citizen and resident of Guam deriving all his income from personal services rendered in Guam would remain free from income tax. The purpose in imposing the territorial income taxes both in Guam and in other possessions has been to assist the possession in becoming self-sustaining. The income tax in Guam, administered and collected as a territorial tax by the territorial authorities since January 1, 1951, has resulted

in substantial tax collections and has brought about the result desired by Congress of enabling the territory to support its own Government and to make it unnecessary for Congress to appropriate funds of the United States for the support of Guam.

Although this Court definitely ruled in the *Laguana* case that the tax is territorial and not federal and is to be collected by the officers of the Government of Guam, taxpayers here insist that the warrants for distraint, levies and withholdings were not issued and made by officers authorized to administer and collect the tax. This amounts merely to a restatement of taxpayers' primary position that allegedly the income tax imposed by Section 31 of the Organic Act is not a territorial tax, from which they deduce as a corollary the proposition that it may not be administered by territorial officials. Taxpayers make no showing whatsoever that Harry L. Mangerich, who issued the warrants and levies as Commissioner of Revenue and Taxation of Guam is not, indeed, the Commissioner of Revenue and Taxation for Guam and that the Commissioner of Revenue and Taxation is not the proper officer authorized to issue warrants for distraint and make levies. The vague conclusions contained in taxpayers' complaint are ineffective to overcome the well recognized presumption of regularity, which attaches to official proceedings and acts. Taxpayers offered no proof by affidavit or otherwise in opposition to the motion for summary judgment. Mere general allegations which do not show the facts in detail are insufficient to prevent the awarding of summary judgment. In a small community such as Guam the District Court, in any event, was warranted in taking judicial notice of the existence of the office of Commissioner of Revenue and Taxation

and of the individual who is the incumbent of that office.

Moreover, the Organic Act fully vests the executive authority of the Government of Guam in the Governor, who is directed faithfully to execute the laws of the United States applicable to Guam and the laws of Guam. The executive authority of the Government of Guam possesses inherently, like the executives of other English and American commonwealths, the power to authorize summary and distraint proceedings for collection of taxes due. Besides, under the terms of Section 31 of the Organic Act the appropriate provisions of the Internal Revenue Codes of 1939 and 1954 authorizing the issuance of distraint warrants and levies are incorporated by reference and would here apply.

3. The District Court correctly held that the amendment to the complaint by the addition of the fourth count did not defeat the motion for summary judgment. Such a motion is not addressed to the pleadings and is not disposed of by mere amendment of the pleadings. A court, upon taking into consideration the allegations of the amended pleading, may find that nevertheless no material issue of fact is raised, and that the moving party is entitled to a judgment as a matter of law. Here the District Court carefully considered the amended complaint and correctly ruled that the addition at the last moment of the fourth count added nothing to the basic issues and was insufficient to constitute a defense to the summary judgment motion.

ARGUMENT

Introductory

The defense of this action both in the District Court and this Court on behalf of the defendants-appellees-employers is undertaken by the United States Department of Justice and its officers because the employers are contractors with the United States and under the contract terms there exists the possibility that the United States would become ultimately liable to satisfy any judgment rendered against the employers instantly. Moreover, in the leading precedent in this field, *Laguana v. Ansell*, 102 F. Supp. 919 (Guam), affirmed by this Court for the reasons given in the District Court's opinion, 212 F. 2d 207, certiorari denied, 348 U.S. 830, the United States intervened as a party both at the trial and on appeal to support the proposition, which that case established, that Section 31 of the Organic Act of Guam (Appendix, *infra*) imposes a territorial tax to be collected by the proper officials of the Government of Guam. It is apparent that taxpayers seek here once more to attack this identical proposition and that their essential position is based on a denial of its correctness, despite the recent ruling of this Court to the contrary.

We are informed that the Government of Guam through its Attorney General will file a brief *amicus curiae* in support of the appellees-employers' position.

I

The Record Establishes That No Genuine Issue Exists as to Any Material Fact

Despite numerous vague and conclusory statements throughout their brief to the effect that a substantial

fact issue exists under the instant record, taxpayers make the concession quoted *infra*, which we submit plainly establishes that the court below was correct in holding, “that there are no issues of fact that remain in the controversy and upon which the court must pass.” (R. 78.) Thus in their brief (p. 41) taxpayers expressly concede:

Appellees caused to be filed in support of their motion to dismiss and for summary judgment an affidavit of Mr. Marshall, together with supporting exhibits. *Appellants concede that Mr. Marshall did accurately relate clearly and correctly all the facts which are material.* The status of the appellees within Guam, their work, the employment of appellants, the receipt of the levies and warrants of distraint, their withholding of pay as authorized by United States tax withholding forms executed by appellants, and the turning over to agents of the Government of Guam of the sums withheld from appellants’ pay upon the demand of agents of Guam.

Appellants concede that the alleged warrants of distraint, the levies, their employment contracts and United States withholding forms are correct. [Italics supplied.]

Indeed, taxpayers are hardly in a position to avoid this concession for the facts sworn to by Mr. Marshall in his affidavit in support of the employers’ motion for summary judgment do not differ in material substance from those alleged in the complaint. As appears from the Statement, *supra*, both the complaint, amended complaint, and the affidavit in support of the summary

judgment motion unite in their statements respecting taxpayers' employment by the appellee—employers, the terms of their contracts, the amounts owed to taxpayers for wages under the contracts, the part of these wages, which were paid to the Government of Guam, the service of the warrants of distraint and the levies issued under the authority of the Government of Guam, and the employers' assertions that the payments and withholdings were made in response to lawful authority.

Accordingly, the only question remaining is whether or not the employers were correct in concluding that these payments to the Government of Guam were required as a matter of law. This issue plainly constitutes an issue of law and is the only issue presented by the record and the record clearly discloses that there is no genuine issue as to any material fact.

Indeed, taxpayers' own statement in their brief of the matters, about which they do not agree with the affidavit of Mr. Marshall, demonstrates that the only issue presented by this case is one of law, as follows (Br. 41):

Appellants do not concur in the conclusion of the affidavit, that the action of appellees *was lawful*, that it was *in response to lawful authority*, or that there is any *justification in law* for the actions of appellees. [Italics supplied.]

II

The Employers Were Required as a Matter of Law to Pay to the Government of Guam the Sums Distrained and Withheld from Taxpayers' Wages

A. First of all it is to be stressed that taxpayers make no claim whatsoever that the amount of tax distrained

and withheld from their wages was incorrect, provided the territorial tax is a valid and subsisting tax; they do not assert that the amount collected is more than the statute imposes or that it was collected for the wrong year or in any other way is improper under the law. Their claim is solely and completely that the territorial income tax is as a matter of law, not a valid and subsisting exaction. Even a cursory analysis of the complaint and amended complaint demonstrates this.

However, in thus contending taxpayers choose to ignore the recent decision of this Court which directly rules adversely to their position here. *Laguana v. Ansell*, 212 F. 2d 207, decided April 15, 1954. This Court there affirmed the District Court of Guam for the reasons given in the opinion of the District Court in that case. In that opinion the District Court pointed out (102 F. Supp. 919-920):

This is a test action brought by the plaintiff, hereinafter called the taxpayer, to determine what construction should be placed upon Sections 30 and 31 of the Organic Act of Guam 64 Stat. 392, 48 U.S. C.A. §§ 1421h and 1421i.

Further, in its opinion, upon which this Court affirmed, the District Court held (p. 921):

It seems to me that it is little more than vagrant intellectual exercise to assume that in these days of great challenge to the United States Congress intended by Sec. 31 to do less than impose the full burden of income taxation, measured by the Federal tax, in this unincorporated territory. Even

the very limited discussion indicates that the Congress was fully aware of the fact that it was taxing those who may have previously come within one or more of the exemptions in 26 U.S.C.A. §§251 and 252.

The District Court's conclusion was (p. 922) "I hold that the effect of Sec. 31 is to impose a territorial tax to be collected by the proper officials of the Government of Guam." The Supreme Court denied taxpayers' application for certiorari from the decision of this Court in the *Laguana* case (348 U.S. 830, October 14, 1954).

In substance taxpayers' effort here is thus to obtain a holding from this Court overruling one of its recent decisions directly in point; nevertheless, their brief in all of its sixty-two pages never once cites the *Laguana* case, but in bland silence hopes to consign it to a disingenuous oblivion. The *Laguana* case plainly and correctly holds that Congress intended persons such as taxpayers who earn income for personal services on Guam to pay an income tax to sustain the territorial Government within whose jurisdiction and under whose protection the income is derived.⁴

Further support for the plainly sensible construction of Section 31 of the Organic Act adopted by this Court in the *Laguana* case and by the court below here is supplied by the legislative history and long standing administrative construction of the substantially identical provision for the Virgin Islands from which Section 31

⁴ See the legislative history of Sections 30 and 31 recited in the District Court's opinion in the *Laguana* case (pp. 920-921); also 96 Cong. Record, Part 6, pp. 7574-7577.

derives. This provision, quoted in the margin,⁵ was explained as providing for local imposition upon the inhabitants of the Virgin Islands of a territorial income tax, payable directly into the Virgin Islands' treasury, to assist that possession in becoming self-supporting.⁶ The enactment was recommended as following the precedent of earlier legislation applying to Puerto Rico and the Philippines.⁷

⁵ Naval Appropriations Act of July 12, 1921, c. 44, 42 Stat. 122, 123, Sec. 1 (48 U.S.C. 1952 ed., Sec. 1397):

* * * the income tax laws now in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in the Virgin Islands of the United States, except that the proceeds of such taxes shall be paid into the treasuries of said islands.

Indeed, under Section 28(a) of the Revised Organic Act of the Virgin Islands, enacted July 22, 1954, c. 558, 68 Stat. 497, 508 (48 U.S.C. 1952 ed., Supp. II, Sec. 1642 (a)), inhabitants of the Virgin Islands presently pay their tax on income from all sources both within and outside the Virgin Islands into the treasury of the Virgin Islands.

⁶ 61 Cong. Record, Part 2, p. 1724; 61 Cong. Record, Part 3, p. 3173.

⁷ Indeed, without exception, for a period of over forty years, from the very inception of the income tax, whenever Congress has imposed the tax in a possession, Congress invariably has directed its collection by officers of the possession and its payment directly into the treasury of the possession. Thus, as to the Philippines and Puerto Rico, see Income Tax Act of 1913, c. 16, 38 Stat. 114, 166-181, Sec. II, M; Revenue Act of 1916, c. 463, 39 Stat. 756, Sec. 23. During the period the Revenue Act of 1918, c. 18, 40 Stat. 1057, Sec. 261, was in force, Congressionally imposed separate income tax systems for those possessions, on the one hand, governed by the provisions and rates of the Revenue Act of 1916, and for the United States, on the other hand, governed by the 1918 Act, were in effect. *Lawrence v. Wardell*, 273 Fed. 405 (C.A. 9th); *Robinette v. Commissioner*, 139 F. 2d 285 (C.A. 6th); *Helvering v. Campbell*, 139 F. 2d 865 (C.A. 4th). Congress was there acting as a local legislature for the territory. *Lawrence v. Wardell*, *supra*, pp. 408, 409. By the Revenue Act of 1917, c. 63, 40 Stat. 300, Sec. 5, and the Revenue Act of 1918, *supra*, Sec. 261, Congress empowered the

The purpose shown in the 1921 legislation for the Virgin Islands, as in its counterpart here involved, has been consistently implemented by both the federal and territorial taxing authorities, who have recognized that Congress created a local, locally collectible income tax and that the United States and the Virgin Islands are distinct taxing jurisdictions although their income tax laws arise from an identical statute applicable to each. Carefully considered and reasoned Internal Revenue rulings, the first of which was issued twenty years ago, announce this result. I.T. 2946, XIV-2 Cum. Bull. 109 (1935); I.T. 3690, 1944 Cum. Bull. 164. The correctness of this official interpretation and practice appears never to have been questioned, and the income tax has been administered in the Virgin Islands in accordance with this construction for over a generation. Such settled administrative constructions, applied in thousands of cases over an extended period, are of course entitled to great weight. *Brewster v. Gage*, 280 U.S. 327, 336; *Fawcus Machine Co. v. United States*, 282 U.S. 375, 378; *Dismuke v. United States*, 297 U.S. 167, 174; *United States v. Amer. Trucking Ass'ns*, 310 U.S. 534, 549; *Roland Co. v. Walling*, 326 U.S. 657, 676; *Corn Products Refining Co. v. Commissioner* (Sup. Ct.) decided November 7, 1955 (1955 C.C.H., par 9746).

By duplicating in Section 31 of the Organic Act of Guam the provision in the Naval Appropriations Act of 1921 for the Virgin Islands (*supra*, fn. 5) Congress in effect adopted the established administrative interpretation of the latter statute, i.e., that it creates a

legislatures of Puerto Rico and the Philippines to amend or repeal the Congressionally imposed local income taxes, powers which both insular legislatures exercised in 1919. Like authority has thus far not been granted the Virgin Islands or Guam.

territorial tax on the locally earned income. This is the construction approved by this Court in the *Laguana* case and by the court below here, which the Treasury repeatedly has placed upon Section 31. I.T. 4046, 1951-1 Cum. Bull. 57; Rev. Rul. 8, 1953, 1953-1 Cum. Bull. 300, 301; Rev. Rul. 56, 1953-1 Cum. Bull. 303; Rev. Rul. 55-184, 1955-13 Int. Rev. Bull. 39, 1955-47 Int. Rev. Bull. 18.

As appears from these rulings and holdings, Sections 251(a) and 252 of the 1939 Internal Revenue Code provide an exemption from the federal tax, avoiding double taxation of income earned in Guam, but have no application to the subsequently created territorial tax under Section 31 of the Organic Act. This finds additional confirmation in the 1954 Internal Revenue Code, whose Sections 931(a) and 932, while otherwise substantially identical with 1939 Code Sections 251(a) and 252, contain in Section 932(c) specific reference to the applicability of United States income tax laws in Guam under Sections 30 and 31 of the Organic Act (Appendix, *infra*). For the same reasons that the cited sections of the 1939 and 1954 Code do not apply to the territorial tax created under Section 31 of the Organic Act—contrary to taxpayers' repeated contentions (Br. 17, 27, 32)—1939 Code Section 1621(a)(8)(B)⁸ providing an exemption from collection of the federal tax by withholding, where at least 80 per cent of the wages are paid for services rendered in a possession, has no application to the territorial tax. Congress plainly intended persons living and earning income from personal services in Guam, like taxpayers, to be subject to income taxation and to its collection by withholding to

⁸ 1954 Code Section 3401(a)(8)(B) is substantially identical.

support the newly set up local government. The statute itself and every bit of evidence as to why it was written refute a contrary construction. It is noteworthy that the taxes, refund of which were denied in the *Laguana* case, had been for personal services rendered, collected by withholding.

Section 31 was obviously designed to change the prior law. On taxpayer's argument, however, there would be no change; a citizen and resident of Guam deriving all his income from personal services rendered in Guam would remain free of income tax. The argument is without substance.

According to information submitted by the Director of Finance of Guam to the Attorney General of Guam, the income tax in Guam, administered and collected as a territorial tax by the territorial authorities, has resulted in total collections under Section 31 from January 1, 1951, the date it became operative, to November 30, 1955, in the amount of \$15,569,221, in addition to \$18,375,198, transferred to Guam under Section 30 by the United States Treasury. These collections have been made from a total population of approximately 72,000.

Further, principally as a consequence of these income tax receipts, Congress has found it unnecessary to appropriate funds of the United States for support of the Government of Guam except the minor items expressly assumed in the Organic Act, such as expenses of the Governor's office and of the legislature, and certain transportation expenses. Section 26(a), (b), (c) and (e). In contrast, prior to the inception of the tax, for the fiscal year ending June 30, 1951, Congress found it

necessary to grant \$1,200,000 to the Department of the Interior for the administration of Guam.

Since the *Laguana* case⁹ the following decisions pertinent to the instant issue have been rendered by the court below, all prior to its ruling in the instant case:

In *Wilson v. Kennedy*, 123 F. Supp. 156 (August, 1954), pending appeal to this Court, No. 14593, the plaintiffs were two employers and two employees of different employers; the defendants, sued as individuals, were the former Commissioner of Revenue and Taxation of Guam, the Governor, Attorney General and Director of Finance of Guam. The complaint alleged that the defendants, acting without authority, required the plaintiffs and others similarly situated to pay income taxes under Section 31 which were used by the Government of Guam. The plaintiffs requested judgment that the defendants repay the taxes alleged illegally to have been collected, be enjoined from future illegal collections and that a declaratory judgment be entered holding that there is no effective territorial income tax law in Guam. The District Court, in granting defendants' motion for summary judgment, held (pp. 158-159):

The *Laguana* case disposed of any question as to the imposition of the tax and the obligation to pay the tax to the proper officials of the Government of Guam. The plaintiffs in the instant case apparently contend, however, that there are no officials of the

⁹ Prior to the *Laguana* decision this Court held in *Crain v. Government of Guam*, 195 F. 2d 414, that the Government of Guam has sovereign immunity from suit without its consent in a case where the plaintiffs sought a declaratory judgment of their rights under Section 31 of the Organic Act.

Government of Guam who have authority to collect the tax and that those officials who pretended to exercise such authority must repay the amounts collected. In the first place we must distinguish between Section 31, which makes the income tax laws in force in the United States of America, current and future, in force in Guam, and any authority the Guam Legislature may have to legislate in the field. The United States Congress as the parent legislative body made the "income tax laws" applicable. We are dealing with a law of the United States. In this complex field it would appear that the Congress intended to do more than just levy taxes. It intended that the taxpayer on Guam should be governed by the income tax laws in force in the United States at any given time. Like the taxes themselves, enforcement of collection must necessarily vary or change at the will of the Congress. If the Government of Guam has available facilities to carry out that will, a taxpayer can hardly be heard to complain that he would prefer some different system of collection.

The issue in the instant case essentially does not differ from that in *Wilson v. Kennedy, supra*. Although taxpayers here repeatedly assert that the instant case is merely an action in breach of contract of employment between private employer and employee and not a tax case, nevertheless, whether or not the contract was broken depends upon whether or not the employers' payments to the Government of Guam out of the employees' salaries were in response to lawful authority and, hence, upon the validity of the income tax. Thus, the employers instantly maintain that under Section

1623 of the 1939 Code (Appendix, *infra*), (or its cognate 1954 Code Section 3403) as incorporated by reference in Section 31 of the Organic Act, they “shall be liable for the payment of the tax required to be deducted and withheld under this subchapter, and shall not be liable to any person for the amount of any such payment.”

Again as to the payments made to the Government of Guam in response to the warrants for distraint and levies, if, as the employers contend, these were for taxes validly due, then it follows they were required by law and the taxpayers have no proper basis for complaint or ground for action. *Antrum v. United States*, 127 F. Supp. 54 (Conn.). Submittedly the *Laguana* case establishes that the taxes were validly due and the payments required by law.

In *Holbrook v. Taitano*, 125 F. Supp. 14 (October, 1954), the District Court of Guam dismissed for lack of jurisdiction a suit by a taxpayer to enjoin tax officials of the Government of Guam from enforcing the income tax imposed by Section 31 of the Organic Act and from requiring the taxpayer there to file returns under the Guam tax. The Court held that Sections 7421 of the 1954 Internal Revenue Code and 3653 of the 1939 Code prohibit any court from maintaining a suit for the purpose of restraining the assessment or collection of any tax. In *Phelan and Crain v. Taitano*, the District Court denied taxpayers’ motion for a temporary injunction and granted the defendants’ motion for dismissal for lack of jurisdiction. (November, 1954.) The District Court of Guam rendered no reported opinion. This action is similar to the *Holbrook* case and seeks injunctive relief of the same type. Consolidated

appeals to this Court from the orders of the District Court are pending (No. 14585).¹⁰

B. Just as taxpayers dispute the validity of the income tax imposition, so apparently do they seek to contest the authority of the officials of the Government of Guam to issue the warrants for distraint and levies. These warrants and levies were all signed by "Harry L. Mangerich, Commissioner of Revenue and Taxation." (R. 42, 43, 45, 46, 47, 48, 50, 51, 52.) As already noted, *supra*, taxpayers concede that warrants and levies so issued and so signed, copies of which are annexed to Mr. Marshall's affidavit, were received. (Br. 41.) However, in their complaint they referred to Mr. Mangerich as "claiming to be Commissioner of Revenue and Taxation for the Government of Guam." (R. 5, 56.) They state (R. 56-57):

* * * that the said Harry L. Mangerich claims his authority stems from Section 31 of the Organic Act of Guam and that said Section 31 incorporates the Internal Revenue Code of the United States into said Organic Act of Guam; that by the construction of the said Harry L. Mangerich and others, officers of the Government of Guam, have the right to interpret, construe, administer and enforce said Internal Revenue Code of the United States.

See also R. 58, 60, 61.

The sworn statement of Mr. Marshall that the sums withheld and distrained from taxpayers' wages were

¹⁰ Taxpayers Phelan and Crain in the cited case also appeared as attorneys for the taxpayers in *Wilson v. Kennedy*, *supra*; *Holbrook v. Taitano*, *supra*; *Crain v. Government of Guam*, *supra*, and the instant case.

paid to the Government of Guam (R. 15, 17, 18) is not disputed. Indeed, in the complaint taxpayers refer to Mr. Mangerich as “an employee of the Government of Guam” (R. 58) and, as already pointed out, in their brief (p. 41) taxpayers concede that Mr. Marshall “did accurately relate” among others “the turning over to agents of the Government of Guam of the sums withheld from appellants’ pay upon the demand of agents of Guam.”

However, taxpayers in their brief (p. 42) assert that—

they believe the plain text of the Organic Act of Guam does not create a local tax but does confer upon the territorial Government the proceeds of any Federal taxes derived from Guam, and that lacking any statutory authority or delegation no local official possesses any legal right, duty or authority to perform any actions in connection with income tax, and therefore, all acts of such officers as set forth in the affidavit of Mr. Marshall are unwarranted and constitute no valid defense to appellees.

This amounts merely to a restatement of taxpayers’ oft reiterated primary position that the income tax imposed by Section 31 of the Organic Act is a federal—and not a territorial tax—from which they deduce as a corollary the proposition that it is to be administered by federal and not territorial officials.¹¹

¹¹ It has already been pointed out earlier in this Point II that taxpayers’ argument here indicates they would claim exemption from any tax payment in case the tax is held to be federal, finding supposed support for such a contention in 1939 Code Sections 251 and 1621 (a) (8) (B).

Nevertheless, this Court has definitely ruled in the *Laguana* case that the tax is territorial and not federal and is to be collected by the officers of the Government of Guam. See also the discussion in the opinion of the court below in *Wilson v. Kennedy, supra*, where the authority of the officers of Guam to collect the tax is directly sustained.

Except for vague and generalized averments in their complaint, taxpayers make no showing whatsoever that Mr. Mangerich is not the Commissioner of Revenue and Taxation for Guam and that the Commissioner of Revenue and Taxation is not the proper officer to issue warrants for distraint and make levies. As noted, taxpayers do not dispute that Mr. Mangerich is an agent or employee of Guam. The well-recognized presumption exists that public officials will discharge their duties honestly and in accordance with rules of law or, as otherwise stated, that a presumption of regularity attaches to official proceedings and acts. *Lieberman v. Van DeCarr*, 199 U.S. 552; *United States v. Fratricks*, 140 F. 2d 5, 7 (C.A. 7th). Mr. Mangerich's official actions then in issuing warrants and levies has attached to them the presumption of regularity, and the conclusions and vague characterizations implying the contrary in taxpayers' complaint are completely ineffective.

Taxpayers chose to rest upon their complaint and offered no proof by affidavit or otherwise in opposition to the motion for summary judgment, although notice of motion was served on February 17, 1955, and the hearing was not had until March 4, 1955. (R. 69.) Nor did taxpayers offer at the hearing to submit any proof that Mr. Mangerich, as Commissioner of Revenue and Taxation, was not authorized to perform the offi-

cial acts of distraint and levy which he did perform. The amended complaint served on the day before the hearing (R. 62) did not serve to impair in any way the employers' proof on the summary judgment motion and substantially added nothing to what previously had been before the Court. See Point III, *infra*. The holding of the Second Circuit in *Engl v. Aetna Life Ins. Co.*, 139 F. 2d 469, 473 (C.A. 2d), is here entirely pertinent, as follows:

Hence we have often held that mere formal denials or general allegations which do not show the facts in detail and with precision are insufficient to prevent the award of summary judgment. [Citing cases.]

Moreover, in *Gifford v. Travelers Protective Assn.*, 153 F. 2d 209, 211, this Court ruled:

Where a defendant presents evidence on which it would be entitled to a directed verdict if believed and which the plaintiff does not discredit as dishonest, *it rests on the plaintiff, in opposing defendant's motion for summary judgment, at least to specify some opposing evidence which it can adduce and which will change the result.* [Italics supplied.]

If any possible ground existed to support a claim that Mr. Mangerich's official proceedings as Commissioner of Revenue and Taxation are not entirely authorized or proper, surely it was incumbent on taxpayers to specify any supposed opposing evidence upon which they rely. See also *Surkin v. Charteris*, 197 F. 2d 77, 79 (C.A. 5th).

In any event, surely the District Court in a small community, such as Guam, was warranted in taking judicial notice of the existence of the office of Commissioner of Revenue and Taxation and of the individual, who was the incumbent of that office. The Organic Act fully vests the executive authority of the Government of Guam in the Governor, who has power to appoint officers, who is directed faithfully to execute the laws of the United States applicable to Guam and the laws of Guam, and upon whom is conferred the power to issue executive regulations. Organic Act of Guam, Sections 6(a), (b) and (c) and 9(b) and (c) (Appendix, *infra*).

Moreover, among the income tax laws in force in the United States, which by Section 31 were held to be likewise in force in Guam, were Section 1622 of the 1939 Code making provision for collection of the income tax at source by withholding,¹² and Sections 3690, 3692 and 3710(a) and (b) of the 1939 Code (Appendix, *infra*) granting authority to distrain and levy and making provision for surrender of property subject to distraint.¹³ In I.T. 4046, *supra*, pp. 58-59, it is said:

I.T. 2946 (C.B. XIV-2, 109 (1935)) holds in part that the United States and the Virgin Islands are separate and distinct taxing jurisdictions although their income tax laws arise from an identical statute applicable to each. It is stated in that ruling that it will be necessary, in some sections of the law (Revenue Act of 1934), to substitute the words "Virgin Islands" for the words "United States" in order to give the law proper effect in those

¹² Section 3402 of the 1954 Code is substantially identical.

¹³ Sections 6331 and 6332 of the 1954 Code contain substantially equivalent provisions.

islands. It is believed that the same principles are applicable to Guam in view of the above-mentioned provisions of the Organic Act of Guam.

On the same principle it is obviously proper in order to carry out the intent of Congress in Section 31 of the Organic Act to substitute for the words "the collector" or his "deputy" in Sections 3690, 3692 and 3710 of the 1939 Code and for "the Secretary or his delegate" in Sections 6331 and 6332 of the 1954 Code, the designation of the appropriate officer of the Government of Guam fulfilling like functions in its revenue system, namely, here the Commissioner of Revenue and Taxation. The court below applied this principle in the instant context in *Wilson v. Kennedy, supra*.

Moreover, from earliest times it has been recognized that the executive implicitly possesses the power by a summary seizure of property to enforce payment of tax debts owed to the state. At common law this procedure existed even prior to *Magna Charta*.¹⁴ Apparently legislation served principally to ameliorate it. The Governor of Guam who, as already has been seen, is required to execute the laws of the United States ap-

¹⁴ Thus in the landmark case, *Murray's Lessee v. Hoboken Land and Improvement Co.*, 18 How. 272, 277, the Supreme Court said:

We apprehend there has been no period, since the establishment of the English monarchy, when there has not been, by the law of the land, a summary method for the recovery of debts due to the crown, and especially those due from receivers of the revenues. It is difficult, at this day, to trace with precision all the proceedings had for these purposes in the earliest ages in the common law. That they were summary and severe, and had been used for purposes of oppression, is inferable from the fact that one chapter of *Magna Charta* treats of their restraint.

See also *Phillips v. Commissioner*, 283 U.S. 589, 595-596.

plicable to Guam and the laws of Guam, and upon whom is conferred the power to issue executive regulations and in whom is vested the executive authority of the Government of Guam, would, it is submitted, without more possess the authority to institute through the officers of Guam proceedings for distraint and levy in collection of taxes imposed by Congress as a territorial tax upon the inhabitants of Guam. Hence, even without application of Sections 3690, 3692, and 3710 of the 1939 Code (and their cognates under the 1954 Code), submittedly the Governor possesses the power through the agency of a subordinate official, in the exercise of the executive authority of the Government of Guam vested in him, to seize property in payment of taxes due Guam.¹⁵

In summary then, all which taxpayers actually have set forth is a legal conclusion that the instant tax is federal, not territorial, and allegedly therefore should not be administered by territorial officers. On this point the *Laguana* case directly rules against them. They have made no showing whatsoever that, assuming the tax is territorial, it was not administered by duly authorized territorial officials. They have in no way overcome the presumption of regularity attaching to the official proceedings concededly taken by the Commissioner of Revenue and Taxation. Under the terms of Section 31 of the Organic Act the appropriate

¹⁵ See also Sec. 5100 of the Government Code of Guam (1952), enacted by the Territorial Legislature which declares that—

There is within the Executive Branch of the government of Guam a Department of Finance. The Director of Finance is the head of the Department of Finance. The Director of Finance is appointed by the Governor with the consent of the Legislature.

provisions of the Internal Revenue Code of 1939 and 1954 would apply, and in any event the executive authority of the Government of Guam possesses inherently, like the executives of other English and American commonwealths, the power traditionally to authorize summary and distraint proceedings for the collection of taxes due.

III

The District Court Correctly Held That the Amendment to the Complaint by the Addition of the Fourth Count Did Not Defeat the Motion for Summary Judgment

The motion for summary judgment and notice of hearing for the motion, as already pointed out, were served on February 17, 1955, returnable fifteen days later on March 4, 1955. (R. 53, 69.) Surely this was ample notice. Rule 56(c) (Appendix, *infra*) prescribes that the motion shall be served at least ten days before the time fixed for the hearing. Rule 56(c) also provides that the adverse party prior to the hearing date may serve opposing affidavits. Taxpayers served no opposing affidavits, but on March 3, 1955, filed their amended complaint. (R. 69.) Here (Br. 33-34), as on the hearing in the court below (R. 73), taxpayers insist that the mere filing of the amended complaint defeated the pending summary judgment motion. This contention is plainly incorrect as a matter of law. A summary judgment motion is not addressed to the pleadings and is not disposed of by a mere change or amendment of the pleadings. The primary purpose of a summary judgment motion is to pierce the allegations in the pleadings to show that no genuine issue of material fact is raised. An amended complaint served during such a

motion's pendency must be considered as is any other competent and pertinent paper. But it does not cancel out the motion nor prevent its consideration on the merits. If the court upon taking into consideration the allegations of the amended pleadings finds that, nevertheless, no material issue of fact is raised and that the moving party is entitled to a judgment as a matter of law, the mere technical amendment of the pleading will not prevent the granting of the motion and the allowance of summary judgment. As explained in 6 Moore's Federal Practice (2d ed.) 2056-2057—

For if during the pendency of a motion for summary judgment, the adverse party amends his pleading as of course or is permitted to do so by the court, the amendment need not defeat the pending motion, unless the amendment is substantial and real and not a mere change in form.

See also *Kowalewski v. City of Hastings*, 112 F. Supp. 825 (Minn.), and *Gordon Corp. v. Cosman*, 232 N. Y. App. Div. 280, 284, 249 N. Y. S. 544, 548.

Here the District Court carefully considered the amended complaint and correctly ruled that it constituted no defense to the summary judgment motion. (R. 73-74, 78-79.) The allegations of the complaint and amended complaint have already been stated and it has been pointed out that the amended complaint differs only by the addition of the fourth count, which, after realleging the allegations of the first and third counts, adds that the employers, conspiring with Mr. Mangerich (who "claims" (R. 60) to be a duly appointed Commissioner of Revenue and Taxation of Guam), and other officials of Guam wilfully deprived

taxpayers and others of a civil right guaranteed to them by the Constitution of the United States and of the Organic Act of Guam, in that their property has been confiscated without due process of law and that (R. 61) under “color of statutory law and regulations” of the United States and Guam they deprived taxpayers and others of their property to the damage of each taxpayer in the sum of \$25,000. Obviously this is merely a restatement of taxpayers’ familiar claim that Section 31 of the Organic Act did not impose a territorial tax, which officers of Guam were authorized to collect. Since, as the employers contend and as this Court held in the *Laguana* case, the territorial tax is valid and subsisting as a matter of law, no right of action exists in taxpayers’ favor by reason of the tax collection, and they have not been damaged in the amount of \$25,000 apiece or in any other amount. Moreover, even if the tax is not territorial, but federal, it is difficult to perceive how taxpayers have been injured by deprivation of civil rights under (R. 54) “Chapter 21, Title 42, U. S. C. A.,” as the amended complaint asserts. Neither by affidavit nor in their lengthy brief do they actually justify a claim of \$25,000 damage or damage in any amount.

The fourth count of the amended complaint sets up no new facts which are substantial and is defective as a matter of law. Surely the District Court was warranted in characterizing this fourth count as “nothing more than a bombastic and unsupported series of generalizations” (R. 78) and in finding (R. 80) that—

the addition at the last moment of the fourth count in the amended complaint adds nothing to the basic issues and it is insufficient to raise any question

under the civil rights statute of the United States; that the defendant's motion for summary judgment is valid.¹⁶

CONCLUSION

The judgment of the District Court is correct and should be affirmed.

Respectfully submitted,

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DECEMBER, 1955.

¹⁶ Further demonstration of the artificiality of this last minute amendment of the complaint is seen in the following: Strangely, notwithstanding that by the time the amended complaint was filed, as Mr. Marshall's affidavit shows, Silvia's salary actually had been distrained and levied upon (R. 17-18), the amended complaint, filed March 3, 1955, still alleges that taxpayer Silvia "is informed and believes" (R. 58) that the employers—

will, on the 3rd day of November, 1954, * * * confiscate the sum of One Hundred Nine Dollars Sixty Five Cents (\$109.65), being the net balance due to plaintiff after deductions from his wages for the preceding week, and further, that defendants will, on the 10th day of November 1954, confiscate the sum of One Hundred Nine Dollars Sixty Five Cents (\$109.65), and further, that on the 17th day of November, 1954, an undetermined sum will be confiscated from the wages of plaintiff by defendants.

and pleads (R. 59) that he "has no adequate remedy at law" and requests injunctive relief in March from acts that had occurred the preceding November and December.

APPENDIX

Organic Act of Guam, c. 512, 64 Stat. 384:

Sec. 3. Guam is hereby declared to be an unincorporated territory of the United States and the capital and seat of government thereof shall be located at the city of Agana, Guam. The government of Guam shall have the powers set forth in this Act and shall have power to sue by such name. The government of Guam shall consist of three branches, executive, legislative, and judicial, and its relations with the Federal Government shall be under the general administrative supervision of the head of such civilian department or agency of the Government of the United States as the President may direct.

(48 U.S.C. 1952 ed., Sec. 1421a.)

Sec. 6 (a) The executive authority of the government of Guam shall be vested in an executive officer, whose title shall be "Governor of Guam", and shall be exercised under the supervision of the head of the department or agency referred to in section 3 of this Act. * * *

(b) The Governor shall have general supervision and control of all executive agencies and instrumentalities of the government of Guam. He shall faithfully execute the laws of the United States applicable to Guam, and the laws of Guam. * * * He shall have the power to issue executive regulations not in conflict with any applicable law. * * *

(c) The Governor shall coordinate and have general cognizance over all activities of a civil

nature of the departments, bureaus, and offices of the Government of the United States in Guam.

(48 U.S.C. 1952 ed., Sec. 1422.)

Sec. 9. * * *

(b) The Governor may appoint or remove any officer whose appointment or removal is not otherwise provided for. All officers shall have such powers and duties as may be conferred or imposed on them by law or by executive regulation of the Governor not inconsistent with any law.

(c) The Governor shall, from time to time, examine the organization of the executive branch of the government of Guam, and shall determine and carry out such changes therein as are necessary to promote effective management and to execute faithfully the purposes of this Act and the laws of Guam.

* * * * *

(48 U.S.C. 1952 ed., Sec. 1422c.)

Sec. 30. All customs duties and Federal income taxes derived from Guam, the proceeds of all taxes collected under the internal-revenue laws of the United States on articles produced in Guam and transported to the United States, its Territories, or possessions, or consumed in Guam, and the proceeds of any other taxes which may be levied by the Congress on the inhabitants of Guam, and all quarantine, passport, immigration, and naturalization fees collected in Guam shall be covered into the treasury of Guam and held in account for the government of Guam, and shall be expended for

the benefit and government of Guam in accordance with the annual budgets.

(48 U.S.C. 1952 ed., Sec. 1421h.)

Sec. 31. The income-tax laws in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in Guam.

(48 U.S.C. 1952 ed., Sec. 1421i.)

Internal Revenue Code of 1939:

SEC. 1623 ¹⁷ [As added by Sec. 2(a) of the Current Tax Payment Act of 1943, c. 120, 57 Stat. 126]
LIABILITY FOR TAX.

The employer shall be liable for the payment of the tax required to be deducted and withheld under this subchapter, and shall not be liable to any person for the amount of any such payment.

(26 U.S.C. 1952 ed., Sec. 1623.)

SEC. 3690. AUTHORITY TO DISTRAIN.

If any person liable to pay any taxes neglects or refuses to pay the same within ten days after notice and demand, it shall be lawful for the collector or his deputy to collect the said taxes, with such interest and other additional amounts as are required by law, by distraint and sale, in the manner provided in this subchapter, of the goods, chattels, or effects, including stocks, securities, bank

¹⁷ Section 3403 of the Internal Revenue Code of 1954 is identical.

accounts, and evidences of debt, of the person delinquent as aforesaid.

(26 U.S.C. 1952 ed., Sec. 3690.)

SEC. 3692. LEVY.

In case of neglect or refusal under section 3690, the collector may levy, or by warrant may authorize a deputy collector to levy, upon all property and rights to property, except such as are exempt by the preceding section, belonging to such person, or on which the lien provided in section 3670 exists, for the payment of the sum due, with interest and penalty for nonpayment, and also of such further sum as shall be sufficient for the fees, costs, and expenses of such levy.

(26 U.S.C. 1952 ed., Sec. 3692.)

SEC. 3710. SURRENDER OF PROPERTY SUBJECT TO DISTRAINT.

(a) *Requirement*.—Any person in possession of property, or rights to property, subject to distraint, upon which a levy has been made, shall, upon demand by the collector or deputy collector making such levy, surrender such property or rights to such collector or deputy, unless such property or right is, at the time of such demand, subject to an attachment or execution under any judicial process.

(b) *Penalty for Violation*.—Any person who fails or refuses to so surrender any of such property or rights shall be liable in his own person and estate to the United States in a sum equal to the

value of the property or rights not so surrendered, but not exceeding the amount of the taxes (including penalties and interest) for the collection of which such levy has been made, together with costs and interest from the date of such levy.

* * * * *

(26 U.S.C. 1952 ed., Sec. 3710.)

Federal Rules of Civil Procedure:

Rule 56. *Summary Judgment*

* * * * *

(b) *For Defending Party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) [As amended December 27, 1946] *Motion and Proceedings Thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

* * * * *

(e) *Form of Affidavits; Further Testimony.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

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IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

RICHARD C. LAMKIN and ANTHONY B. SILVIA, *Appellants*,
v.

BROWN AND ROOT, INC., PACIFIC BRIDGE COMPANY, INC.,
MAXON CONSTRUCTION COMPANY, INC., UTAH CONSTRUCTION
COMPANY, INC., and SWINNERTON AND WALLBERG,
a co-partnership, joint adventurers doing business under
the name of BROWN-PACIFIC-MAXON, *Appellees*.

**Appeal From the Judgment of the District Court of Guam
Civil Case No. 65-54**

BRIEF AMICUS CURIAE OF THE GOVERNMENT OF GUAM

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Agana, Guam
February 10, 1956

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IN THE
United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 14,772

RICHARD C. LAMKIN and ANTHONY B. SILVIA, *Appellants*,

v.

BROWN AND ROOT, INC., PACIFIC BRIDGE COMPANY, INC.,
MAXON CONSTRUCTION COMPANY, INC., UTAH CONSTRUCTION
COMPANY, INC., and SWINNERTON AND WALLBERG,
a co-partnership, joint adventurers doing business under
the name of BROWN-PACIFIC-MAXON, *Appellees*.

**Appeal From the Judgment of the District Court of Guam
Civil Case No. 65-54**

BRIEF AMICUS CURIAE OF THE GOVERNMENT OF GUAM

PRELIMINARY STATEMENT

The Government of Guam, with the permission of this Court, submits the within brief amicus curiae in support of the judgment of the District Court of Guam.

OPINION BELOW

The opinion of the District Court of Guam from which this appeal is taken was rendered orally (R. 78-80), and is not reported.

JURISDICTION

This case was instituted by plaintiffs-appellants in the District Court of Guam to enjoin the defendants-appellees from honoring levies against the wages of the plaintiffs-appellants issued by the Commissioner of Revenue and Taxation of the Government of Guam to collect the income tax enacted by the Congress of the United States by Section 31 of the Organic Act of Guam, 64 Stat. 384, 392, 48 U.S.C., 1952 ed., Sec. 1421i; to enjoin the appellees from further withholding from the wages of appellants and other employees of the appellees in payment of such income tax; for an accounting to appellants and other employees for sums withheld from their wages in payment of such income tax since January 1, 1951; for money damages in favor of each appellant respectively in the amount of \$25,000 for deprivation of their property without due process of law; and a money judgment in favor of appellant Lamkin in the amount of \$504.26 with interest, being the amount of wages due appellant Lamkin but paid by appellees to the Government of Guam in response to the levy of the Commissioner of Revenue and Taxation.

Appellant Lamkin is a citizen of Colorado and appellant Silvia of California. Both are employed by appellees within the unincorporated territory of Guam where appellees are engaged in the construction of military installations for the United States. (R. 1, 54.)

Jurisdiction of the District Court of Guam is pursuant to Section 22(a) of the Organic Act of Guam, 64 Stat. 384, 389, 48 U.S.C., 1952 ed., Sec. 1424(a).

Appellants' complaint was filed October 28, 1954. (R. 3, 68.) Service of summons was made October 30, 1954. (R. 68).

On February 17, 1955, appellees filed a motion to dismiss because the complaint failed to state a claim upon which relief could be granted, and for summary judgment. (R. 12.) On the same date notice was given that the motion would be brought on for hearing on March 4, 1955. (R. 53.)

On March 3, 1955, appellants filed an amended complaint. (R. 54, 69.)

A hearing on the motion was held March 4, 1955, the District Court granting appellees' motion for summary judgment. (R. 71-80, 68.) Judgment granting the motion for summary judgment was entered March 15, 1955. (R. 63.)

Appellants filed notice of appeal on April 13, 1955. (R. 65.)

Jurisdiction is conferred on this Court by 28 U.S.C., Sections 1291 and 1394, as amended by the Act of October 31, 1951, c. 655, Sections 48 and 50(a), 65 Stat. 710, 726, 727.

STATEMENT OF THE CASE

The Government of Guam concurs in the statement set forth in appellees' brief, pages 4-12, as a complete and accurate presentation.

QUESTIONS PRESENTED

The questions presented are:

1. Whether as a matter of law the appellees were required to withhold from appellants' wages and to honor distraints upon appellants' wages in payment of an income tax obligation to the Government of Guam pursuant to Section 31 of the Organic Act of Guam.

2. Whether the existence of any genuine issue of fact precluded the granting of the motion for summary judgment.

3. Whether the filing of the amended complaint precluded the granting of the motion for summary judgment.

STATUTES AND RULES INVOLVED

Organic Act of Guam, c. 512, 64 Stat. 384:

“Section 3. Guam is hereby declared to be an unincorporated territory of the United States and the capital and seat of government thereof shall be located at the city of Agana, Guam. The government of Guam shall have the powers set forth in this Act and shall have power to sue by such name. The government of Guam shall consist of three branches, executive, legislative, and judicial, and its relations with the Federal Government shall be under the general administrative supervision of the head of such civilian department or agency of the Government of the United States as the President may direct.” (48 U.S.C. 1952 ed., Sec. 1421a.)

“Section 6(a). The executive authority of the government of Guam shall be vested in an executive officer, whose title shall be ‘Governor of Guam’, and shall be exercised under the supervision of the head of the department or agency referred to in section 3 of this Act. * * *

(b) The Governor shall have general supervision and control of all executive agencies and instrumentalities of the government of Guam. He shall faithfully execute the laws of the United States applicable to Guam, and the laws of Guam. * * * He shall have the power to issue executive regulations not in conflict with an applicable law. * * *

(c) The Governor shall coordinate and have general cognizance over all activities of a civil nature of the departments, bureaus, and offices of the Government of the United States in Guam.” (48 U.S.C. 1952 ed., Sec. 1422.)

“Section 9. * * *

(b) The Governor may appoint or remove any officer whose appointment or removal is not otherwise provided for. All officers shall have such powers

and duties as may be conferred or imposed on them by law or by executive regulation of the Governor not inconsistent with any law.

(c) The Governor shall, from time to time, examine the organization of the executive branch of the government of Guam, and shall determine and carry out such changes therein as are necessary to promote effective management and to execute faithfully the purposes of this Act and the laws of Guam.

* * * (48 U.S.C. 1952 ed., Sec. 1422c.)

“Section 30. All customs duties and Federal income taxes derived from Guam, the proceeds of all taxes collected under the internal-revenue laws of the United States on articles produced in Guam and transported to the United States, its Territories, or possessions, or consumed in Guam, and the proceeds of any other taxes which may be levied by the Congress on the inhabitants of Guam, and all quarantine, passport, immigration, and naturalization fees collected in Guam shall be covered into the treasury of Guam and held in account for the government of Guam, and shall be expended for the benefit and government of Guam in accordance with the annual budgets.” (48 U.S.C. 1952 ed., Sec. 1421h.)

Section 31. The income-tax laws in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in Guam.” (48 U.S.C. 1952 ed., Sec. 1421i.)

Internal Revenue Code of 1939:

“Section 1621. Definitions.

As used in this subchapter—

* * *

(e) Number of withholding exemptions claimed.

The term ‘number of withholding exemptions claimed’ means the number of withholding exemptions claimed in a withholding exemption certificate in effect under section 1622(h), except that if no such certificate is in effect, the number of withholding ex-

emptions claimed shall be considered to be zero.” (26 U.S.C. 1952 ed., Sec. 1621(e).)

“Section 1623. Liability for Tax.

The employer shall be liable for the payment of the tax required to be deducted and withheld under this subchapter, and shall not be liable to any person for the amount of any such payment.” (26 U.S.C. 1952 ed., Sec. 1623.)

“Section 3690. Authority to Distrain.

If any person liable to pay any taxes neglects or refuses to pay the same within ten days after notice and demand, it shall be lawful for the collector or his deputy to collect the said taxes, with such interest and other additional amounts as are required by law, by distraint and sale, in the manner provided in this subchapter, of the goods, chattels, or effects, including stocks, securities, bank accounts, and evidences of debt, of the person delinquent as aforesaid.” (26 U.S.C. 1952 ed., Sec. 3690.)

“Section 3692. Levy.

In case of neglect or refusal under section 3690, the collector may levy, or by warrant may authorize a deputy collector to levy, upon all property and rights to property, except such as are exempt by the preceding section, belonging to such person, or on which the lien provided in section 3670 exists, for the payment of the sum due, with interest and penalty for nonpayment, and also of such further sum as shall be sufficient for the fees, costs, and expenses of such levy.” (26 U.S.C. 1952 ed., Sec. 3692.)

“Section 3710. Surrender of Property Subject to Distrain.

(a) Requirement.—Any person in possession of property, or rights to property, subject to distraint, upon which a levy has been made, shall, upon demand by the collector or deputy collector making such levy, surrender such property or rights to such collector or deputy, unless such property or right is, at the time of such demand, subject to an attachment or execution under any judicial process.

(b) **Penalty for Violation.**—Any person who fails or refuses to so surrender any of such property or rights shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of the taxes (including penalties and interest) for the collection of which such levy has been made, together with costs and interest from the date of such levy.

* * *” (26 U.S.C. 1952 ed., Sec. 3710.)

Federal Rules of Civil Procedure.

“Rule 56. Summary Judgment.

* * *

(b) **For Defending Party.** A party against whom a claim, counterclaim or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.”

SUMMARY OF ARGUMENT

1. Appellants contend that their employers, the appellees, are acting illegally in withholding from their wages, honoring distraints upon their wages, and turning the proceeds over to the Government of Guam in payment of the income tax imposed by Section 31 of the Organic Act of Guam. According to appellants, Section 31 merely extends the

income tax laws of the United States to Guam as a Federal tax and that consequently it is illegal for appellees to pay such proceeds to the Government of Guam and officials of the Government of Guam have no authority to enforce the tax.

Appellees contend, in accordance with the decision of this Court in *Laguana v. Ansell*, (CA 9, 1954) 212 F. 2d 207, affirming the decision of the District Court of Guam, (DC Guam, 1952) 102 F. Supp. 919, certiorari denied, 348 U.S. 830, 75 S. Ct. 51, 99 L. Ed. 32, that Section 31 creates a separate territorial income tax to be enforced by the Government of Guam.

The *Laguana* decision, which is not even mentioned by appellants, cites the legislative history of Section 31. It is shown that the separate tax therein provided was derived from a comparable tax enacted by Congress for the Virgin Islands.

The obvious purpose of Section 31 was to change existing law and provide revenue for the new territorial government. Under appellants' construction, however, this would not be accomplished because of the exemption provisions as to income derived from Guam.

Appellants' objections to the lack of authority of Harry L. Mangerich and the tax enforcement officials of the Government of Guam is again based on appellants' interpretation of Section 31. Since, however, Section 31 creates a territorial tax the objection fails.

The term "income-tax laws" as used in Section 31 is not limited to tax rates, exemptions and deductions but includes the various enforcement procedures of the Internal Revenue Code. Without these enforcement procedures, such as authority to make assessments and levies, to distrain on property, and take other measures to collect the tax, the Government of Guam would be unable to carry out the intent of Congress in providing the tax.

The power to enforce the territorial tax comes from the Organic Act itself, the primary responsibility being in the Governor of Guam who in turn may designate subordinate officials to carry out enforcement.

2. The instant case presents no genuine issue of any material fact that would make the granting of the summary judgment improper. There is in effect agreement between appellants and appellees as to the basic facts, and their differences are in regard to the legal conclusions to be drawn from these facts.

3. The filing by the appellants of an amended complaint, on the day before the hearing of appellees' motion for summary judgment, did not preclude the District Court from granting the motion. The amended complaint presented no new allegations raising an issue of fact or in any way justifying the denial of appellees' motion.

ARGUMENT

INTRODUCTION

The instant case is the third of three appeals from the District Court of Guam presently pending before this Court, all of which raise the same common fundamental question of law. The other two cases, *Wilson v. Kennedy*, No. 14,593, and *Phelan v. Taitano*, No. 14,585, were heard and submitted on December 12, 1955.

The common question of law in all these cases is whether or not Section 31 of the Organic Act of Guam creates a separate territorial income tax to be enforced by the Government of Guam.

This question has already been decided in the affirmative by this Court in *Laguana v. Ansell*, (CA 9, 1954) 212 F. 2d 207, affirming the District Court's opinion, (DC Guam, 1952) 102 F. Supp. 919. The Supreme Court denied certiorari, 348 U.S. 830, 75 S. Ct. 51, 99 L. Ed. 32. It may be noted that the United States intervened in the *Laguana* case in support of the separate tax construction.

I

Appellees Were Required as a Matter of Law to Withhold From Appellants' Wages and to Honor Distraints Upon Appellants' Wages in Payment of an Income Tax Obligation to the Government of Guam Pursuant to Section 31 of the Organic Act of Guam

The affidavit of J. Russell Marshall, project manager for the appellees in Guam, in support of appellees' motion for summary judgment (R. 13-53), in effect concedes the substance of the allegations of fact in the complaint but indicates that the actions of the appellees were in response to law.

Whether or not appellees have acted in response to law in withholding wages from the appellants and other employees, in honoring levies on the wages of appellants, and in turning the proceeds over to the Government of Guam depends upon the interpretation to be given Section 31 of the Organic Act. This section reads as follows:

“Section 31. The income-tax laws in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in Guam.”

The contention of the appellees, which has also been the position of the United States and the Government of Guam in prior litigation, is that Section 31 creates a separate territorial income tax, payable to the Government of Guam, and to be enforced by the Government of Guam.

Appellants' contention is summarized (Appellants' Brief, 42-43) as follows:

“Appellants wish to make clear their position that they executed Federal withholding forms authorizing withholding for Federal taxes due, if any, and for no other purpose. That they believe the plain text of the Organic Act of Guam does not create a local tax but does confer upon the territorial Government the proceeds of any Federal taxes derived from Guam, and

that lacking any statutory authority or delegation no local official possesses any legal right, duty or authority to perform any actions in connection with income tax, and therefore, all acts of such officers as set forth in the affidavit of Mr. Marshall are unwarranted and constitute no valid defense to appellees.

* * * *

“Appellants deem it clear that the District Court of Guam holds that there exists in Section 31 of the Organic Act (1421i T 48 U.S.C.A.) a separate and distinct local income tax, similar in text to the Federal, though changed in certain respects.

“The District Court of Guam in reaching this conclusion, we submit, ignored the canons of statutory construction, and is either legislating judicially or accepting the executive legislative acts of the Government of Guam. The District Court of Guam further ignores the provisions and plain meaning of Section 30 of the Organic Act of Guam (1421h T 48 U.S.C.A.). It is believed that both sections should be read together, the one by its plain text extends the Federal income tax statutes to embrace Guam; the other giving to the local Government the proceeds of Federal taxes, no mention being made of local taxes.”

The same basic legal question underlying the present case was decided by this Court in *Laguana v. Ansell*, supra.

In the *Laguana* case plaintiff Laguana sued defendant Ansell, the Acting Tax Commissioner and Acting Treasurer of the Government of Guam, for a refund of the tax withheld from his wages and paid into the Treasury of Guam. The factual situation is thus identical with the instant case in so far as appellants are objecting to the actions of the appellees in withholding from wages of the appellants and their other employees and paying the proceeds to the Government of Guam.

The opinion of the District Court, under date of February 29, 1952, states at page 920 and following of 102 F. Supp. 919:

“The position taken by the taxpayer is that Sec. 31 made applicable to Guam the Federal income-tax laws as such, including any provisions granting exemptions from taxation on income derived from sources within possessions of the United States, 26 U.S.C.A., Sections 251 and 252.

“The position taken by the governments is that the effect of Sec. 31 is to set up a separate income-tax system for Guam which is a duplicate of the Federal income-tax system; that the United States Congress in exercising its authority to legislate for the unincorporated territories and possessions has established a separate and distinct taxing jurisdiction which contemplates collection of the tax by territorial officials for the use and benefit of the inhabitants of the territory; that in the alternative the taxpayer cannot be heard to complain in the instant case as the tax was owing and reached the eventual source for which it was intended.

* * * * *

“It seems to me that it is little more than vagrant intellectual exercise to assume that in these days of great challenge the United States Congress intended by Sec. 31 to do less than impose the full burden of income taxation, measured by the Federal tax, in this unincorporated territory. Even the very limited discussion indicates that the Congress was fully aware of the fact that it was taxing those who may have previously come within one or more of the exemptions in 26 U.S.C.A., Section 251 and 252.

“The United States Treasury Department has construed Sec. 31 as establishing a territorial tax to be administered by the officials of the Guam government and the United States supports that holding, 1951-6-13559, I.T. 4046. The taxpayer has therefore complied with the instructions of both governments in meeting his tax liability and his tax has covered into the treasury of Guam. He cannot now be heard to say that the tax should be returned to him in order that it be paid to the United States and returned to the Guam treasury from which it was taken. The case of *Stone v. White*, 301 U.S. 532, 57 S. Ct. 851, 81 L. Ed. 1265, disposes of any such contention.

“The question remains as to whether Sec. 31 imposes a Federal tax to be collected by the United States or a territorial tax to be collected by the Government of Guam.

* * * * *

“As the governments point out, however, in those instances when Congress has made the income-tax laws in force in the United States applicable to possessions it has in the two major instances of the Philippines and Puerto Rico directed that such tax was to be collected by the territorial governments; and the courts have held that the effect of such legislation was to levy a territorial tax. *Lawrence v. Wardell*, 9 Cir., 273 F. 406; *Robinette v. Commissioner of Internal Revenue*, 6 Cir., 139 F. 2d 285. Later both the Philippines and Puerto Rico were given authority to adopt their own income-tax laws.

“The Naval Appropriations Act of 1921, 42 Stat. 122, 123, contained the following proviso: ‘That the income tax laws now in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in the Virgin Islands of the United States, *except that the proceeds of such taxes shall be paid into the treasuries of said islands.*’ (Italics supplied.)

“It does not appear that this proviso has been the subject of reported litigation but the United States Treasury construed it in its opinion I.T. 2946 (C.B. X14-2, 109 (1935)) as establishing separate and distinct taxing jurisdictions although their income-tax laws arose from an identical statute applicable to each. In its opinion I.T. 4046, 1951-6-13559 is similarly construed Sec. 31, *supra*, as establishing a separate territorial tax in Guam and that Section 251(a) of the Internal Revenue Code is applicable insofar as taxes due the United States are involved.

“Regardless of my initial view that Sec. 31 imposed a Federal tax to be collected by the United States, I believe that I shall add to any existing confusion by persisting in that view in the light of the position taken by the governments involved and my conviction that in any event a tax is imposed. I hold that the

effect of Sec. 31 is to impose a territorial tax to be collected by the proper officials of the Government of Guam."

This Court affirmed the decision of the District Court on April 15, 1954 by stating, 212 F. 2d 207:

"For the reasons given in the Court's opinion filed February 29, 1952, 102 F. Supp. 919, the judgment is affirmed."

The appellants in the instant case are thus in effect asking that the *Laguana* decision be overruled. However, they do not ask this expressly. In fact the appellants completely ignore the *Laguana* case! They argue as if the present appeal were a case of first instance—as if the *Laguana* case had never been filed and determined.

In contending that Section 31 merely "extends the Federal income tax statutes to embrace Guam," the proceeds of which are given to the Government of Guam pursuant to Section 30 (Appellants' Brief, 43), appellants fail to mention that their interpretation of Section 31 would effect no significant change in prior existing law.

The United States income tax has long applied to income earned in Guam by United States citizens, but the exemption provided by Section 251 of the United States Internal Revenue Code of 1939¹ permitted an avoidance of the tax with reference to income earned in Guam, Guam being a "possession" as used in the section. Taxpayers who were citizens of Guam but not of the United States were also granted an exemption by Section 252(a).² Further, under Section 1621(a)(8)(B),³ wages coming under the exemption were not subject to withholding.

¹ Section 931 of the Internal Revenue Code of 1954.

² Section 932(a) of the Internal Revenue Code of 1954.

³ Section 3401(a)(B) of the Internal Revenue Code of 1954.

The purpose of Section 31, however, as shown in its legislative history, recited in the *Laguana opinion*, 102 F. Supp. at pages 920-921, was to tax income earned in Guam which had previously escaped taxation. At the time it was also intended to grant this additional revenue to the Government of Guam for its support. Under appellants' interpretation this two-fold purpose would be completely frustrated.

Thus appellants argue that under Section 1621(a)(8)(B) of the Internal Revenue Code of 1939 the withholding provisions do not apply to their wages. (Appellants' Brief, 27, 32.) They also argue for the continued application of the exemption provided by Section 251 of the Internal Revenue Code of 1939. (Appellants' Brief, 56.)

In ruling that Section 31 established a separate territorial tax, the District Court in the *Laguana opinion* ruled that these provisions did not apply. Thus in the opinion, page 921 of 102 F. Supp. it is stated:

“Even the very limited discussion indicates that the Congress was fully aware of the fact that it was taxing those who may have previously come within one or more of the exemptions in 26 U.S.C.A. Sections 251 and 252.”

In its formal conclusions of law in the *Laguana case* (not included in the opinion) the Court was explicit as to the withholding exemption:

“Although upon the facts as found by the Court, the plaintiff fulfills the requirements of Section 1621(a)(8)(B) of the Internal Revenue Code of the United States, the benefits of that section are not available to plaintiff by virtue of Section 31 of the Organic Act of Guam.”

Sections 251 and 252(a) continued to apply, of course, after the enactment of Section 31, with regard to the Federal income tax. But, as has been indicated, they have no

application to the separate territorial tax created by Section 31.

In this connection it is pointed out that in the Internal Revenue Code of 1954, passed after the decision of this Court in the *Laguana* case, Sections 931 and 932(a) remain substantially identical to the former comparable Sections 251 and 252(a). However, an additional provision, Section 932(c), has been added making specific reference to the application of the United States income tax laws to Guam under Sections 30 and 31 of the Organic Act.

Even more striking approval by Congress of the decision in the *Laguana* case has been indicated by Public Law 321, 84th Congress, approved August 9, 1955, which amends in part Section 3401 of the Internal Revenue Code of 1954 to read as follows:

“Sec. 3401. Definitions.

(a) Wages. For purposes of this chapter, the term ‘wages’ means all remuneration (other than fees paid to a public official) for services performed by an employee for his employer, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include remuneration paid—

* * * *

(8)(A) for services for an employer (other than the United States or any agency thereof)—

(i) performed by a citizen of the United States, if, at the time of the payment of such remuneration, it is reasonable to believe that such remuneration will be excluded from gross income under section 911; or

(ii) performed in a foreign country *or in a possession of the United States* by such a citizen if, at the time of the payment of such remuneration, the employer is required by the law of any foreign country *or possession of the United States* to withhold income tax upon such remuneration; * * *”
(Amendment to prior law indicated by italics.)

The effect of this amendment, adding the reference to "possession of the United States," is to exempt from the United States withholding tax any income which is subject to withholding by a possession of the United States.

"Possession" includes, of course, the unincorporated territory of Guam. Section 25, Organic Act of Guam; 48 U.S.C., 1952 ed., Section 1421c(b).

The legislative history of Public Law 321, shows that Senate Report No. 1244, July 29, 1955, of the Senate Committee on Finance accepted House Report No. 1354, July 23, 1955, of the House Committee on Ways and Means, which states, in part:

"REASONS FOR BILL

Under present law the wages of a United States citizen employed in Puerto Rico or a possession of the United States may under certain circumstances be reduced by withholding for the income tax of Puerto Rico or the possession as well as for the Federal income tax. This is true even though eventually the foreign tax credit in these cases usually relieves the taxpayer of most or all of the Federal income tax liability. This has presented especially serious problems in the case of Puerto Rico although the problem also exists to a lesser extent in the case of the Virgin Islands *and* Guam. As a result of this double withholding, potential employees are reluctant to take jobs in Puerto Rico or the possessions. Moreover, the Internal Revenue Code already relieves United States citizens who perform services in a foreign country (for an employer other than the United States) from the withholding of the Federal income tax where withholding of a foreign income tax is provided." (Italics added.)

1955 U. S. Code Congressional and Administrative News, No. 14, August 20, 1955, page 4294.

Laguana v. Ansell has been followed in the District Court of Guam by a number of other cases.

Wilson v. Kennedy, supra, appeal presently pending in this Court, is similar to the instant case in that the basic issue as to the proper interpretation of Section 31 is raised by objecting to withholding from wages in payment of the territorial tax and also by claiming officials of the Government of Guam have no authority to enforce the tax. The plaintiffs are two employers and two employees of a different employer. The defendants are the then Commissioner of Revenue and Taxation, the Governor, Attorney General, and Director of Finance. Plaintiffs sought a refund of taxes collected, an injunction against future enforcement, and a declaratory judgment that there is no territorial income tax.

The *Wilson* case goes beyond the *Laguana* case among other points in regard to the question of the alleged lack of authority of officials of the Government of Guam to collect the tax, and as to whether the term "income-tax laws" as used in Section 31 includes enforcement provisions.

It is stated in the District Court's Opinion, page 158 of 123 F. Supp.:

"The plaintiffs in the instant case apparently contend, however, that there are no officials of the Government of Guam who have authority to collect the tax and that those officials who pretended to exercise such authority must repay the amounts collected. In the first place we must distinguish between Section 31, which makes the income tax laws in force in the United States of America, current and future, in force in Guam, and any authority the Guam Legislature may have to legislate in the field. The United States Congress as the parent legislative body made the 'income tax laws' applicable. We are dealing with a law of the United States. In this complex field it would appear that the Congress intended to do more than just levy taxes. It intended that the taxpayer on Guam should be governed by the income tax laws in force in the United States at any given time. Like

the taxes themselves, enforcement of collection must necessarily vary or change at the will of the Congress. If the Government of Guam has available facilities to carry out that will, a taxpayer can hardly be heard to complain that he would prefer some different system of collection. * * *

“The individual defendants are:

“(a) The Governor of Guam who is charged with responsibility faithfully to execute the laws of the United States applicable to Guam and the law of Guam, 48 U.S.C.A. 1422(b), 64 Stat. 386.

“(b) The Attorney General of Guam who is head of the Department of Law for that government, Government Code of Guam, Section 5101.

“(c) The Director of Finance who is the head of the Department of Finance, Government of Guam, Government Code of Guam, Section 5100.

“(d) Commissioner of Revenue and Taxation who enforces and administers the territorial income tax (affidavit of Director of Finance).

“In the view of this court these plaintiffs can rest secure that those defendants are neither interlopers nor imposters but that they are the duly appointed officials whose responsibility includes the collection of income taxes under Section 31, the appropriate provisions of the United States Revenue Code, and applicable laws of Guam.

* * * * *

“The applicable provisions in the United States Revenue Code to enforce the payment of the territorial income tax are ‘income tax laws’ within the meaning of section 31 and are available to the Director of Finance or those authorized by him, subject to those non-substantive changes in nomenclature as are necessary to avoid confusion as to the taxing jurisdiction involved.”

In the instant case these points decided in the *Wilson* case are again raised. Appellants object to the lack of authority of the tax enforcement officials of the Govern-

ment of Guam. (Appellants' Brief, 42, 49, 51, 52, 53.) The complaint more specifically objects to the lack of authority of Harry L. Mangerich on behalf of the Government of Guam, to make assessments and levies, and to interpret, construe, administer and enforce the tax created by Section 31. (R. 3, 5, 6, 8, 54, 56, 57, 58.)

However, appellants' objection as to the alleged lack of authority is founded again on the basic contention that there is no territorial income tax. Since the separate tax has been established by the *Laguana* case, the objection necessarily fails.

Thus there is no question of any delegation of power from the United States Commissioner of Internal Revenue to officials of the Government of Guam. (Appellants' Brief, 42, 49, 52.) Nor is it necessary for Congress to specify in the Internal Revenue Code that it is to be enforced in Guam by officials of the Government of Guam.

Rather, since Section 31 creates a territorial tax, separate and distinct from the Federal income tax, the authority of officials of the Government of Guam to enforce it stems from the Organic Act itself. As mentioned in the *Wilson* case, *supra*, the Governor of Guam has the general responsibility of executing the laws of the United States applicable to Guam and the laws of Guam. Section 6(b), Organic Act. The Governor in turn may designate subordinate officials to perform these enforcement functions. Sections 6(b), 9(b) and (c), Organic Act.

Appellants' argument (Appellants' Brief, 53) that without legislation by the Legislature of Guam there can be no local authority to enforce the alleged separate territorial tax is without basis. The authority to enforce comes direct from the Organic Act and no local implementation by the Legislature of Guam is necessary. Appellants' argument would give the local legislature a veto power over a tax imposed by Congress. As stated by the Appellate Division, District Court of Guam, in *Government of Guam v.*

Kaanehe, Criminal Case No. 6-A, decided January 23, 1956, (further discussed, *infra*) and as yet not reported:

“The Organic Act of Guam needs no local implementation nor publication to make it effective, other than as provided by 64 Stat. 393, 48 U.S.C. 1421, note.”

As indicated in the *Wilson* case, the term “income-tax laws” must be interpreted broadly to embrace all enforcement procedures provided in the Internal Revenue Code, including the summary powers of levy and distraint under Sections 3690 and 3692 of the Internal Revenue Code of 1939,⁴ if there is to be an efficiently administered tax as Congress intended. Further, these procedures are available to the tax officials of the Government of Guam.

The broad scope of the term “income-tax laws” as used in Section 31 is further shown in *Holbrook v. Taitano*, (D.C. Guam, 1954) 125 F. Supp. 14. This was a suit to enjoin tax officials of the Government of Guam (including Mr. Mangerich, referred to by appellants in their complaint and brief in the instant case) from enforcing the tax. Defendants filed a motion to dismiss. The Court held that Section 3653 of the Internal Revenue Code of 1939 and Section 7421 of the Internal Revenue Code of 1954 applied as part of the separate territorial tax and prohibited the Court from maintaining the suit to enjoin. The complaint was dismissed for lack of jurisdiction. No appeal was taken.

In *Phelan v. Taitano*, *supra*, presently pending before this Court, the District Court of Guam dismissed a similar suit to enjoin collection of the tax and for judgment against Mr. Taitano, the Director of Finance, and Mr. Mangerich, for sums collected by them in payment of taxes by distraint on plaintiffs’ bank accounts. There was no reported opinion.

⁴ Section 6331(a) and (b) are the comparable provisions of the Internal Revenue Code of 1954.

The latest decision of the District Court of Guam on the scope of the term "income-tax laws" was made by the Appellate Division on January 23, 1956, in the case of *Government of Guam v. Kaanehe*, Criminal Case No. 6-A, already quoted *supra*.

The Island Court of Guam, an inferior court having jurisdiction over misdemeanors, had dismissed for lack of jurisdiction a criminal prosecution based upon violation of Section 145(a), Internal Revenue Code of 1939, failure to file a tax return, as made applicable as a law of Guam by Section 31. The Government of Guam appealed. In an opinion by Judge McLaughlin, United States District Judge, Hawaii, concurred in by Judge Shriver, District Judge, Guam, and Judge Wiig, United States District Judge, Hawaii, the Appellate Division of the District Court reversed the Island Court, holding that Section 145(a) of the Internal Revenue Code was adopted by reference as part of the separate territorial income tax when Congress enacted Section 31. The Court said:

"An entire code of laws, including criminal provisions, may be adopted by reference. In so doing, it is not necessary to repeat the adopted code. *Engel v. Davenport*, 271 U.S. 33 (1926); *Ex Parte Krause*, *supra*; *United States v. Davis*, 71 F. Supp. 749 (D.D.C. 1947). If the reference is clear, the adopted code is to be applied in toto, unless there is an indication to the contrary in the language of the enactment. Here, there is nothing in either the statute or its legislative history to suggest that Congress wished to adopt only part of the income tax laws of the United States for Guam. U. S. Code, Congressional Service, 81st Congress, Second Session 1950, Vol. 2, p. 2856. Any other conclusion would arbitrarily destroy the effectiveness of Sec. 31."

In the instant case, since Section 31 creates a separate territorial income tax, appellees have an expressed and specific defense to appellants' claim with regard to withholding in Section 1623 of the Internal Revenue Code of 1939, and Section 3403, the comparable provision of the Internal Revenue Code of 1954. These provisions are a part of the separate territorial tax law.

Similarly, with regard to honoring the distraints on appellants' wages, appellees were bound to comply by Section 3710 of the Internal Revenue Code of 1939 under the penalty of personal liability. Such compliance is a defense to an employer in an action by an employee who sues for his wages, as shown in *Antrum v. United States*, (D.C. Conn., 1953) 127 F. Supp. 54, where the Court granted a motion to dismiss the complaint, saying:

“It fails to state a claim against the employer, Seymour Manufacturing Company, on which relief may be granted, for it sets up payment or surrender by the employer upon a valid distraint for taxes due.”

It is submitted that on the basis of the *Laguana* decision, holding that Section 31 creates a separate territorial tax, the ruling of the District Court in the instant case was correct.

II

There Is No Genuine Issue as to Any Material Fact

Under Rule 56 it is provided that summary judgment “shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”

Appellants contend (Appellants' Brief, 19-26) that there are numerous issues of fact in the instant case and that the court accordingly erred in granting the summary judgment.

However, a reading of the complaint and amended complaint (R. 3-10, 54-62) together with the affidavit of Mr. Marshall and exhibits filed in support of appellees' motion (R. 13-53) shows no substantial variance as to any material facts.

Appellants themselves concede this (Appellants' Brief, 41):

“Appellees caused to be filed in support of their motion to dismiss and for summary judgment an affidavit of Mr. Marshall, together with supporting exhibits. Appellants concede that Mr. Marshall did accurately relate clearly and correctly all the facts which are material. The status of the appellees within Guam, their work, the employment of appellants, the receipt of the levies and warrants of distraint, their withholding of pay as authorized by United States tax withholding forms executed by appellants, and the turning over to agents of the Government of Guam of the sums withheld from appellants' pay upon the demand of agents of Guam.

Appellants concede that the alleged warrants of distraint, the levies, their employment contracts and United States withholding forms are correct.”

It is obvious that the only genuine, material differences between the parties are questions of law not of fact—whether the appellees were legally required to withhold from the wages of the appellants and their other employees and to honor distraints upon appellants' wages and pay the proceeds to the Government of Guam under the income tax enacted by Section 31 of the Organic Act. It is a question of the interpretation of Section 31—whether it creates a separate territorial tax to be enforced by the Government of Guam as contended by the appellees and as held by this Court, or whether it merely extends the United States income tax to Guam as a Federal tax as contended by appellants.

Appellants' further comment on Mr. Marshall's affidavit (Appellants' Brief, 41) seems to agree that the issue is only one of law:

“Appellants do not concur in the conclusion of the affidavit, that the action of appellees was lawful, that it was in response to lawful authority, or that there is any justification in law for the actions of appellees.”

At the hearing (R. 75), counsel for appellants even more concisely stated the basic legal issue:

“The Court: * * * What relief do you expect the court to grant here?

Mr. Phelan: *I want BPM to stop withholding from my client money that is owed to the United States in tax.*

The Court: In other words, you want to reach the question as to whether your client owed the tax?

Mr. Phelan: *The question is has BPM any right to withhold the tax.*” (Italics supplied)

Appellants argue (Appellants’ Brief, 22) that to justify the granting of a summary judgment:

“An affidavit cannot controvert a fact well pleaded and the moving party must clearly demonstrate that no controverted issue of fact remains.”

Even if it were conceded that there are any well pleaded facts in the complaint or amended complaint (as distinct from conclusions of law) which are controverted in Mr. Marshall’s affidavit, appellants’ contention is not sound.

Thus it is stated in 6 Moore’s Federal Practice (2d ed.), Section 56.11 (3), page 2068:

“There are some holdings, but mostly judicial statements, to the effect that an amendment of fact in a pleading cannot be overcome by an affidavit and hence in such a case a motion for summary judgment must be denied. This doctrine overlooks the fact that one of the prime purposes of summary judgment procedure is to pierce the pleadings; and the doctrine, if applied, would largely nullify the summary judgment procedure. The true rule is opposed to the foregoing doctrine. Summary judgment should be rendered, even though an issue may be raised formally by the pleadings, where the supporting affidavits and the opposing affidavits, if any, show that there is no genuine issue of material fact.”

This view finds support in the following decisions of this Court:

Lindsey v. Leavy, (CA 9, 1945) 149 F. 2d 899

Leishman v. Radio Condenser Co., (CA 9, 1948) 167 F. 2d 890

Koepke v. Fontecchio, (CA 9, 1949) 177 F. 2d 125

That the sole question is one of law, turning on the interpretation of Section 31 of the Organic Act, is further indicated by the fact that appellants nowhere allege in their complaints or brief any claim that, assuming there is a separate territorial tax, the amounts of the assessments against the appellants are erroneous, or that there was any failure to give required notices, or make required demands, or comply with other required procedures by any tax enforcement officials of the Government of Guam.

Even with regard to Mr. Mangerich, appellants refer to him as "claiming to be Commissioner of Revenue and Taxation for the Government of Guam" (R. 5, 56) but nowhere deny that he actually held that office at the time the action was commenced.⁵

Appellants further allege (R. 3, 54) that the action is brought to enjoin the appellees "from obeying certain orders, directives and levies issued by employees, agents, servants and attorneys of the Government of Guam *under claim of right and alleged color of law claimed to exist under the laws of the United States, particularly the Revenue Act of 1954 and the Organic Act of Guam, Chapter 8A, Title 48, U.S.C.A.* as hereinafter fully appears." (Italics added.)

If there were any contention of fact as to Mr. Mangerich's appointment or official position, or that of any other officer or employee engaged in enforcing the territorial income tax, it was incumbent on appellants to allege the facts in their

⁵ In *Phelan v. Taitano*, supra, pending before this Court, Mr. Mangerich is one of the defendants.

pleadings, or counter the affidavit of Mr. Marshall wherein he refers to such officials.

As stated by this Court in *Gifford v. Travelers Protective Association* (CA 9, 1946) 153 F. 2d 209:

“Where a defendant presents evidence on which it would be entitled to a directed verdict if believed and which the plaintiff does not discredit as dishonest, it rests on the plaintiff in opposing defendant’s motion for summary judgment, at least to specify some opposing evidence which it can adduce and which will change the result.”

As it is, the question of Mr. Mangerich’s appointment to office, or that of other Government of Guam officials, is not an issue in the instant case. It turns instead, as far as the authority of officials is concerned, on the question of law whether the Organic Act gives them authority to enforce the tax imposed by Section 31 and whether enforcement procedures of the Internal Revenue Code are available to them. These are issues of law.

Appellants allege as an example of a genuine material issue of fact their contention that appellees have breached their employment contract and this is a suit for breach of contract. (Appellants’ Brief, 21.) Yet if appellees must comply with the provisions of the separate territorial income tax, a question of law, they have a defense and there is no breach of contract.

Appellants also contend (Appellants’ Brief, 20):

“ * * * that they have not authorized appellees to withhold any sums except for taxes due to the United States. Exhibits ‘C’ and ‘E’ to Mr. Marshall’s affidavit support this. Yet, appellees assert that they have paid such sums to the Treasurer of Guam.”

Exhibits “C” and “E” (R. 37, 40) are in no sense “authorizations” to the employer to pay taxes. They are what their title indicates—Form W-4, “Employee’s With-

holding Exemption Certificate.” Withholding is not dependent upon the execution of one of these forms by the employee. The employer is not the agent of the employee. Withholding is required by provisions of the income tax law and Form W-4 merely affords the employee a means to claim his exemptions for the determination of the rate of withholding. If he does not execute Form W-4, he is still subject to withholding but without the benefit of any exemptions. Section 1621(e), Internal Revenue Code of 1939.⁶

It is submitted that further analysis of appellants’ examples of issues of fact are unnecessary.

In each instance the issue of fact turns on the interpretation of Section 31 of the Organic Act.

If the instant case were to go to trial, it is submitted that no evidence could be offered by appellants that would change the result in their favor.

III

The District Court Correctly Held That the Filing of the Amended Complaint Did Not Preclude the Granting of Appellees’ Motion for Summary Judgment

Appellees’ motion for summary judgment, with the affidavit of Mr. Marshall attached, and notice of hearing of the motion, were filed February 17, 1955, and served upon appellants the same date. The hearing was set for March 4, 1955. (R. 53.)

Appellants did not serve or file any opposing affidavits, but filed an amended complaint on March 3, 1955, the day before the hearing on appellees’ motion.

Appellants contended at the hearing (R. 72), and again in their brief (Appellants’ Brief, 33-34) that since by Rule 15 they were entitled to file an amended complaint as a

⁶ Section 3401(e), Internal Revenue Code of 1954.

matter of right, the appellees, in order to reach the amended complaint, would have to file a new motion or at least re-file their pending motion.

Appellants' contention is erroneous, however, in so far as it is claimed there is any automatic termination of the pending motion by the mere filing of the amended pleading. An intervening amended pleading that is of a technical nature or is not substantially different from the original, does not preclude the granting of a summary judgment on the pending motion. As set forth in 6 Moore's Federal Practice (2d ed.) Section 56.10, pages 2056-2057:

"For if during the pending of a motion for summary judgment, the adverse party amends his pleading as of course or is permitted to do so by the Court, the amendment need not defeat the pending motion, unless the amendment is substantial and real and not a mere change in form."

This principle is also set forth in:

Gordon Corp. v. Cosman, (1931) 232 App. Div. 280, 249 N.Y.S. 544

Kowalewski v. City of Hastings, (DC Minn., 1953) 112 F. Supp. 825

Park-In Theaters, Inc. v. Paramount-Richards Theaters, Inc., (DC Del., 1949) 9 F.R.D. 267 (where motion was held defeated because of substantial changes in the amended complaint).

In a somewhat analogous situation this Court ruled in *Leishman v. Radio Condenser Co.*, (CA 9, 1948) 167 F. 2d 890:

"On June 21, 1946, while the motion for summary judgment was pending, Leishman moved for leave to file a supplemental answer, a copy of which appears in the record. The motion was denied. Leishman contends that the denial was error. This contention need not be considered, for even if the supplemental answer had been filed, still the pleadings together with

the affidavits, would have showed there was no genuine issue as to any material fact and that Condenser and General were entitled to a judgment as a matter of law. Assuming, therefore, without deciding, that it was error to the motion, Leishman was not prejudiced thereby."

In the instant case it is submitted that the amended complaint presents no new allegations that could possibly raise an issue of fact or would have justified the denial of appellees' motion for summary judgment by the District Court.

The fourth count realleges the first and third counts of the amended complaint and then adds:

"2. That defendants, conspiring with one Harry L. Mangerich, who claims to be a duly appointed Commissioner of Revenue and Taxation of the unincorporated territory of Guam, and other officials of the Government of Guam unknown to plaintiffs, did wilfully deprive plaintiffs and others of a civil right guaranteed to them by the Constitution and laws of the United States of America and the Organic Act of Guam, to wit: their property has been confiscated without due process of law contrary to the express provisions of Title 26 U.S.C.A.; that defendants, acting in concert with the said Harry L. Mangerich and others, under color of statutory law and regulations of the United States of America and the unincorporated territory of Guam, did deprive plaintiffs and others of their property and right to property as hereinbefore alleged, to the damage of each plaintiff in the sum of Twenty-five Thousand Dollars (\$25,000.00)." (R. 60.)

The fourth count is thus a charge of conspiracy resulting in appellants' being deprived of their property without due process of law.

The acts which constitute this alleged conspiracy, however, as set forth in the first and third counts, are nothing more than compliance by appellees with the provisions of the territorial income tax pertaining to withholding, levy

and distraint, as enforced by Mr. Mangerich and other officials of the Government of Guam. In other words, it merely reiterates the basic issue as to the interpretation of Section 31 of the Organic Act of Guam.

The fourth count could not possibly be sustained unless the first and third counts were also sustained, and this could be achieved only by overruling the decision of *Laguana v. Ansell*, supra, and, adopting appellants' view of Section 31—namely, that Section 31 does not create a separate territorial tax but merely extended the Federal income tax to Guam.

CONCLUSION

It is submitted that the District Court of Guam properly granted appellees' motion for summary judgment, that the instant appeal is without merit, and that the decision of the District Court should be affirmed.

Respectfully submitted,

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Agana, Guam
February 10, 1956

No. 14823

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CARPINTERIA LEMON ASSOCIATION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

CARPINTERIA LEMON ASSOCIATION,

Respondent.

Petition for Review and Petition for Enforcement of Order
of National Labor Relations Board.

Brief of Petitioner, Carpinteria Lemon Association.

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FILE

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PAUL R. GILLEN, C.

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Petition for Review and Petition for Enforcement of Order
of National Labor Relations Board.

Brief of Petitioner, Carpinteria Lemon Association.

Preliminary Statement.

A. Jurisdiction.

The matter to which review is sought consists of a Decision and Order dated April 13, 1955 [Tr. 73-75],¹

¹Transcript of Record.

made by the National Labor Relations Board (hereinafter called the "Board") in a proceeding entitled Carpinteria Lemon Association (hereinafter called "Petitioner") and United Fresh Fruit & Vegetable Workers, LIU No. 78, CIO (hereinafter called the "Fruit & Vegetable Union") case number 21-CA-1929, holding that Petitioner had committed unfair labor practices and had refused to bargain with the said union.

The Petition praying that the Order of the Board be set aside was filed under the provisions of Section 101.14 of the Rules and Regulations of the Board, and under the provisions of Section 10(f) of the Labor Management Relations Act, 1947, and in compliance with Rule 34 of the Rules of the United States Court of Appeals for the Ninth Circuit, as amended effective January 1, 1949.

The above Act of Congress, approved June 23, 1947, known and designated as the "Labor Management Relations Act, 1947" (29 U. S. C. A., Sec. 141), provides as follows as to review of this Order:

"Sec. 10(f). Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside." (29 U. S. C. A., Sec. 160(f).)

B. Statement of the Case.

Petitioner is a California cooperative nonprofit association with its principal place of business in Carpinteria, California, where it is engaged in processing and packing citrus fruits [Tr. 11, 15].

On November 18, 1953, Petitioner's employees elected said Fruit & Vegetable Union, as their bargaining representative [Tr. 6]. On November 27, 1953, the Board certified said Fruit & Vegetable Union as the employees' exclusive bargaining representative [Tr. 8-9].

Bargaining meetings were held between Petitioner and said Fruit & Vegetable Union on December 18 and 22, 1953, January 6 and 22, 1954, and February 9, 1954 [Tr. 54]. On February 11, 1954, a petition signed by 50 of the 68 employees and repudiating the said Union was served on Petitioner [Tr. 108-109, 27-32]. Petitioner refused to bargain further [Tr. 54-56]. Charges were filed by said Fruit & Vegetable Union against Petitioner on February 25, 1954, alleging discriminatory lay-offs and refusal to bargain with said Union [Tr. 9-10]. Complaint was issued by the Board on or about May 28, 1954 [Tr. 13-14], and hearing was had before Trial Examiner Herman Marx, in Carpinteria, California, on October 6 and 8, 1954 [Tr. 49].

Petitioner filed written Exceptions to the Trial Examiner's Findings that Petitioner had committed unfair labor practices: (1) by refusal to bargain with said Fruit & Vegetable Union, and (2) by granting a unilateral wage

increase [Tr. 72], and to his recommendations that Petitioner bargain with the United Packinghouse Workers of America, Local 78, CIO (hereinafter referred to as the "Meatpackers Local") Union [Tr. 69].

The Board affirmed the Rulings and Recommendations of the Trial Examiner and ordered Petitioner to bargain with the said Meatpackers Local [Tr. 73-76].

Petitioner thereafter filed its Petition for Review with the above entitled court [Tr. 81].

C. Specifications of Error.

The Board erred in affirming the Findings, Conclusions and Recommendations of the Trial Examiner as follows: (1) that the said Meatpackers Local is the exclusive bargaining representative of Petitioner's employees; (2) that Petitioner committed unfair labor practices by refusal to bargain with the said Meatpackers Local; (3) in recommending that in the future Petitioner bargain with said Meatpackers Local; (4) that Petitioner committed unfair labor practices by making unilateral wage increases; and (5) that Petitioner engaged in unfair labor practices within the meaning of 8(a) (1), (3) and (5) of the Labor Management Relations Act [Tr. 72].

ARGUMENT.

I.

The Union Is Not the One Elected by the Employees and Is Not a Bargaining Representative of the Employees' "Own Choosing."

Employees have the statutory right "to bargain collectively through representatives of their own choosing." (Sec. 7, Labor Management Relations Act, 1947, 29 U. S. C. A., Sec. 157.)

The instant point is presented in support of Petitioner's Exceptions to the Board's Findings and Conclusions that Petitioner committed unfair labor practices by refusal to bargain with said Meatpackers Local, and to the Board's Order that Petitioner:

" . . . Upon request, bargain collectively with United Packinghouse Workers of America, Local 78, CIO, as the exclusive representative of the employees in the appropriate unit described above, and if an understanding is reached embody such understanding in the signed agreement." [Tr. 71].

The Unions involved herein, namely, the said Fruit & Vegetable Union, the said Meatpackers Local, and the United Packinghouse Workers of America, CIO, an international union (hereinafter called the "Meatpackers International") are the same unions that are referred to in the related case of Santa Clara Lemon Association, No. 14840.

The facts in this case are substantially the same on the above issue as the facts in the Santa Clara case. In the instant case the Board approved the substitution of

the said Meatpackers' Local "For the reasons set forth in Santa Clara Lemon Association," etc. [Tr. 74, footnote 1].

Therefore, we incorporate herein by reference and make a part hereof as though set forth herein in full the argument on pages 5 through 24 of the Brief of Petitioner, Santa Clara Lemon Association, filed with the above entitled court on or about December 31, 1955, in Case No. 14840.

For the reasons heretofore stated the Board's Order that Petitioner bargain collectively with the said Meatpackers Local, is contrary to law and in violation of the rights of the employees in the bargaining unit, and the Board's finding that Petitioner failed and refused, contrary to the Act, to bargain with the said Meatpackers Local should be reversed.

II.

Granting the Unilateral, General Wage Increase Did Not Constitute an Unfair Labor Practice.

It was stipulated that a general wage increase was granted on March 21, 1954, retroactive to February 7, 1954 [Tr. 102]. Petitioner admits that it did not consult the Fruit & Vegetable Union about the wage increase [Tr. 102].

The reasons for the wage increase and the circumstances surrounding it were explained by McIntyre, Petitioner's manager [Tr. 110-111].

Petitioner stood between the demands of the Fruit & Vegetable Union on one side and the demands of a majority of its employees on the other [Tr. 110]. Wage adjustments were made to meet the competition of other

packing houses. The new wage rates of \$1.15 for women and \$1.35-1.40 for men were established by ascertaining what other packing houses in the area were paying [Tr. 102].

The Trial Examiner considers that "the purpose is immaterial" even though the wage increase was made solely because of business necessity [Tr. 63, footnote 11]. The Board has not been so arbitrary. It has held that unilateral wage increases may be made when bargaining negotiations were in suspension.

In regard to the effect of "suspension" of negotiations, the Board declared:

"In these circumstances the respondent was under no duty to withhold normal action respecting wages pending consultation with the Union." (*Montgomery Ward & Co.*, 39 N. L. R. B. 229; *Westchester Newspapers, Inc.*, 26 N. L. R. B. 630.)

In the instant case we have negotiations suspended as a result of the conflicting demands of the Fruit & Vegetable Union on one side, and of a majority of the employees and unusual circumstances on the other. How soon the difficulty would be resolved by the Board, or by a court, or both, could not be foreseen. It might take a month, a year, or even two or three years. In the meantime the employees would be deprived of a wage increase. Petitioner's labor supply would be jeopardized by its inability to meet competitive wage rates. Should both Petitioner and the employees be penalized by a frozen wage scale throughout the period necessary to resolve the legal conflict?

Petitioner did the only thing that it could reasonably do under the circumstances. It made unilateral wage increases [Tr. 110-111].

For each of the above reasons there is no substantial evidence to support the Board's finding that Petitioner violated the Act by granting a unilateral wage increase.

Respectfully submitted,

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No. 14823

**In the United States Court of Appeals
for the Ninth Circuit**

CARPINTERIA LEMON ASSOCIATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

**ON PETITION FOR REVIEW AND REQUEST FOR ENFORCEMENT
OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD**

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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FILED

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OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD*

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of Carpinteria Lemon Association to review and set aside an order of the National Labor Relations Board (R. 74-76) ¹ issued against petitioner on April 13, 1955, following the usual proceedings under Section 10 (e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Sec. 151, *et seq.*), hereafter called the Act. In its answer (R. 87-92) the Board has requested enforcement of its order.

¹ References to portions of the printed record are designated "R." Wherever in a series of references a semicolon appears, references preceding the semicolon are to the Board's findings; succeeding references are to the supporting evidence.

This Court has jurisdiction of the proceeding pursuant to Section 10 (e) and (f) of the Act, the unfair labor practice having occurred at petitioner's plant in Carpinteria, California, within this judicial circuit. The Board's decision and order are reported in 112 N. L. R. B. No. 20.

COUNTERSTATEMENT OF THE CASE

As more fully explained in the Board's brief (pp. 2-5) in No. 14840 on this Court's docket (*Santa Clara Lemon Association v. N. L. R. B.*), this case is one of five cases presently before the Court in which the Board found that the employers, a group of independent nonprofit cooperatives engaged in the processing and packing of citrus fruit in Southern California,² each violated the Act by refusing to bargain with the Union³ which was the certified representative of their employees. Specifically, the Board based its unfair labor practice findings in this case on (1) petitioner's refusal to meet or deal further with the Union when, less than three months after certification of the Union by the Board, petitioner received a petition signed by a majority of its employees purporting to repudiate the Union as their bargaining representative, and (2) petitioner's subsequent conduct in increasing wages without negotiating with the Union. The evidentiary facts, in

² Petitioner, herein sometimes referred to as Carpinteria, operates a packing house in Carpinteria, California, from which it ships a substantial amount of citrus fruit into interstate commerce (R. 51: 101). No jurisdictional issue is presented.

³ United Fresh Fruit and Vegetable Workers Union, L. I. U., No. 78, CIO, herein called the Union.

the main stipulated, upon which these findings are based may be summarized as follows:

I. The Board's findings of fact

On November 18, 1953, a majority of Carpinteria's employees, at a Board-conducted representation election held pursuant to a consent election agreement entered into by the parties, voted for the Union to represent them in collective bargaining (R. 52; 102-103). No objections were filed to the conduct of the election and the Union was certified as bargaining representative of the employees on November 27, 1953 (R. 52; 8-9, 103).

Thereafter, beginning on December 18, 1953, and lasting through February 9, 1954, a series of five meetings were held between Carpinteria and the Union for the purpose of negotiating a collective bargaining agreement (R. 54; 103). In the course of these meetings the Union submitted a proposed written contract, the provisions of which were discussed at length, and Carpinteria offered counterproposals with respect to some subjects (R. 54; 103-104). Although no final agreement was reached, and the parties had not discussed wages, nonetheless "considerable progress was made and tentative agreements were reached on numerous phases of the contracts" during the five negotiation sessions (*ibid.*). On February 11, however, two days after the fifth meeting, a document signed by a majority of the employees was served on Carpinteria stating that the employees "no longer wish to be represented by [the Union], and that we hereby cancel the right of said Local to represent us in any matter pertaining to our employment" (R. 55; 27).

The petition further requested that Carpinteria recognize and negotiate with a committee of three named employees as bargaining representative of the signatories thereto (R. 55; 30).

Shortly following receipt of the employee petition by Carpinteria, the latter's attorney informally advised Syd Rose, a Union field representative, that negotiations with the Union were being broken off (R. 56; 40). Rose, on February 24, wrote a letter to Carpinteria in which he requested that "negotiations be resumed at once," and further cautioned Carpinteria that "the Union's certification as sole collective bargaining agent is valid and enforceable" (R. 56; 40). Two days later Carpinteria replied, through its counsel, that in view of the employee petition purporting to repudiate the Union as their bargaining representative, "it may be an unlawful labor practice * * * to continue further bargaining with the Union" (R. 56; 41). Rose again wrote Carpinteria on March 11, 1954, and "request[ed] that negotiations be resumed at the earliest possible time" (R. 56:42). However, no further meetings were held, and no agreement was ever reached (R. 56; 104).

Several weeks following Carpinteria's refusal to meet further with Union, Carpinteria put into effect a wage increase of 15-20 cents, without prior notification to or consultation with the Union (R. 62; 102).

II. The Board's conclusions and order

Upon the foregoing facts, the Board concluded that Carpinteria had violated Section 8 (a) (5) and (1) of the Act by breaking off contract negotiations

with the Union and by thereafter unilaterally granting a wage increase to its employees (R. 74, 67). To remedy the foregoing unfair labor practices, the Board's order requires Carpinteria to cease and desist from refusing to bargain collectively with the Union, under the name it adopted following affiliation in July 1954 with the Packinghouse Workers,⁴ and from in any like manner interfering with its employees in the exercise of their statutory right to organize and bargain collectively (R. 74-75). Affirmatively, the Board's order requires Carpinteria, upon request, to bargain with the Union, under its present name, and to post appropriate notices (R. 75).

ARGUMENT

The Board's finding that petitioner violated Section 8 (a) (5) and (1) of the Act and its order requiring petitioner to bargain with the Union as now affiliated are valid and proper

Carpinteria apparently concedes the correctness of the Board's ruling that it violated Section 8 (a) (5) and (1) of the Act by refusing to bargain with the Union upon receipt of the petition by which a majority of the employees purported to revoke the authority of the Union to represent them. See *Ray Brooks v. N. L. R. B.*, 348 U. S. 96. Thus, Carpinteria makes only two contentions respecting the

⁴ A full statement of the facts pertaining to the Union's affiliation with the Packinghouse Workers and the amendment to the Union's certification to reflect its affiliation is contained in the Board's brief (pp. 13-15) in No. 14840, to which the Court is respectfully referred. In directing Carpinteria to bargain with the Union as presently affiliated, the Board, in its decision in this case, relied on "the reasons set forth in [its decision in] *Santa Clara Lemon Association*" (No. 14840).

Board's findings and order: (1) that Carpinteria was warranted in granting a wage increase without notifying or consulting the Union because bargaining negotiations had been "suspended" during the period that the propriety of Carpinteria termination of negotiations was being adjudicated (Br. 6-8), and (2) that the Union's affiliation with the Packinghouse Workers resulted in the formation of a new and different union from that certified by the Board, and that the Board's order is therefore invalid insofar as it requires Carpinteria to bargain with the Union as now affiliated (Br. 5-6). These contentions are identical both in point of fact and law with those made by petitioner and fully discussed by the Board in its brief in Case No. 14840. Accordingly, rather than repeat the same discussion here, we respectfully refer the Court to the Board's brief in No. 14840 (pp. 25-38) for a statement of the reasons why we believe both contentions should be rejected.

CONCLUSION

The Board respectfully requests that its order be enforced in full.

THEOPHIL C. KAMMHOLZ,
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FEBRUARY 1956.

No. 14824

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SEABOARD LEMON ASSOCIATION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

NATIONAL LABOR RELATIONS BOARD,

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vs.

SEABOARD LEMON ASSOCIATION,

Respondent.

Petition for Review and Petition for Enforcement of Order
of National Labor Relations Board.

Brief of Petitioner Seaboard Lemon Association.

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FILED

DEC 30 1955

PAUL A. O'BRIEN, CLERK

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SEABOARD LEMON ASSOCIATION,

Respondent.

Petition for Review and Petition for Enforcement of Order
of National Labor Relations Board.

Brief of Petitioner Seaboard Lemon Association.

Preliminary Statement.

A. Jurisdiction.

The matter to which review is sought consists of a Decision and Order dated April 13, 1955 [Tr. 65-68],¹ made

¹Transcript of Record.

by the National Labor Relations Board (hereinafter called the "Board") in a proceeding entitled Seaboard Lemon Association (hereinafter called "Petitioner"), and United Fresh Fruit & Vegetable Workers, LIU No. 78, CIO (hereinafter called "Fruit & Vegetable Union") case number 21-CA-1948, holding that Petitioner had committed unfair labor practices and had refused to bargain with the said Union.

The Petition praying that the Order of the Board be set aside was filed under the provisions of Section 101.14 of the Rules and Regulations of the Board, and under the provisions of Section 10(f) of the Labor Management Relations Act, 1947, and in compliance with Rule 34 of the Rules of the United States Court of Appeals for the Ninth Circuit, as amended effective January 1, 1949.

The above Act of Congress, approved June 23, 1947, known and designated as the "Labor Management Relations Act, 1947" (29 U. S. C. A., Sec. 141), provides as follows as to review of this Order:

"Sec. 10(f). Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside." (29 U. S. C. A., Sec. 160(f).)

B. Statement of the Case.

Petitioner is a California cooperative non-profit association with its principal place of business in Oxnard, California, where it is engaged in processing and packing citrus fruits [Tr. 11, 15].

On November 4, 1953, Petitioner's employees elected said Fruit & Vegetable Union as their bargaining representative [Tr. 6]. On November 13, 1953, the Board certified said Fruit & Vegetable Union as the employees' exclusive bargaining representative [Tr. 8-9].

Bargaining meetings were held between Petitioner and said Fruit & Vegetable Union on January 4, 29, February 5, 18, 25 and March 17, 25, 1954 [Tr. 44]. On March 25, 1954, a petition signed by more than a majority of the employees and repudiating said Union was served on Petitioner [Tr. 46, 104, 24]. Charges were filed by said Fruit & Vegetable Union against Petitioner on March 29, 1954, alleging refusal to bargain with said Union [Tr. 9-10]. Complaint was issued by the Board on or about May 28, 1954 [Tr. 11-14], and hearing was had before Trial Examiner Herman Marx, in Oxnard, California, on October 4 and 5, 1954 [Tr. 36, 39].

Petitioner filed written Exceptions to the Trial Examiner's Findings that it committed unfair labor practices: (1) by refusal to bargain with said Fruit & Vegetable Union; (2) by granting a unilateral wage increase, and (3) to his Recommendation that Petitioner bargain with the United Packinghouse Workers of America, Local

78, CIO (hereinafter referred to as the "Meatpackers Local") [Tr. 63-64].

The Board affirmed the Rulings and Recommendations of the Trial Examiner and ordered Petitioner to bargain with the said Meatpackers Local [Tr. 65].

Petitioner thereafter filed its Petition for Review with the above entitled court [Tr. 73].

C. Specifications of Error.

The Board erred in affirming the Findings, Conclusions and Recommendations of the Trial Examiner as follows: (1) that the said Meatpackers Local is the exclusive bargaining representative of Petitioner's employees; (2) that Petitioner committed unfair labor practices by refusal to bargain with the said Meatpackers Local; (3) in recommending that in the future Petitioner bargain with the said Meatpackers Local; (4) that Petitioner committed unfair labor practices by making a unilateral wage increase; (5) that Petitioner engaged in unfair labor practices within the meaning of 8(a) (1) and (5) of the Labor Management Relations Act [Tr. 76-77].

ARGUMENT.

I.

The Union Is Not the One Elected by the Employees and Is Not Bargaining Representative of the Employees' "Own Choosing."

Employees have the statutory right "to bargain collectively through representatives of their own choosing." (Sec. 7, Labor Management Relations Act, 1947, 29 U. S. C. A., Sec. 157.)

The instant point is presented in support of Petitioner's Exceptions to the Board's Findings and Conclusions that Petitioner committed unfair labor practices by refusal to bargain with said Meatpackers Local, and to the Board's Order that Petitioner:

"Upon request, bargain collectively with United Packinghouse Workers of America, Local 78, CIO, as the exclusive representative of the employees in the appropriate unit described above, and if an understanding is reached embody such understanding in a signed agreement." [Tr. 67.]

The Unions involved herein, namely, the said Fruit & Vegetable Union, the said Meatpackers Local and the United Packinghouse Workers of America, CIO, an international union (hereinafter called the "Meatpackers International"), are the same unions that are referred to in the related case of Santa Clara Lemon Association, No. 14840.

The facts in this case are substantially the same on the above issue as the facts in the *Santa Clara* case. In the

instant case the Board approved the substitution of the Meatpackers Local "For the reasons set forth in Santa Clara Lemon Association," etc. [Tr. 66, footnote 1].

Therefore, we incorporate herein by reference and make a part hereof as though set forth herein in full the argument appearing on pages 5 through 24 of the Brief of Petitioner, Santa Clara Lemon Association, filed with the above entitled court on or about December 31, 1955 in Case No. 14840.

For the reasons heretofore stated the Board's Order that Petitioner bargain collectively with the said Meatpackers Local is contrary to law and in violation of the rights of the employees in the bargaining unit, and the Board's finding that Petitioner failed and refused, contrary to the Act, to bargain with the Meatpackers Local should be reversed.

II.

Granting the Unilateral, General Wage Increase Did Not Constitute an Unfair Labor Practice.

It was stipulated that a general wage increase was granted on April 2, 1954 [Tr. 94]. Petitioner admits that it did not consult any Union about the wage increases [Tr. 110].

The reasons for the wage increases and the circumstances surrounding them were explained by Petitioner's Manager, Clarence Sewell [Tr. 105-110]. Petitioner made the wage increases because of a change in operations necessitating an hourly rate of pay instead of the former

piece rate [Tr. 106], and to meet the competitive wage increases [Tr. 105].

The Trial Examiner considers that the purpose is immaterial even though the wage increase was made solely because of business necessity [Tr. 55, footnote 12]. The Board has not been so arbitrary. It has held that unilateral wage increases may be made when bargaining negotiations were in suspension. In regard to the effect of a "suspension" of negotiations, the Board declared:

"In these circumstances the respondent was under no duty to withhold normal action respecting wages pending consultation with the Union." (*Montgomery Ward & Co.*, 39 N. L. R. B. 229; *Westchester Newspapers, Inc.*, 26 N. L. R. B. 630.)

In the instant case we have negotiations suspended as a result of the conflicting demands of the Fruit & Vegetable Union on one side and of a majority of the employees and unusual circumstances on the other [Tr. 24-26]. How soon the difficulty would be resolved by the Board, or by a Court, or both, could not be foreseen. It might take a month, a year, or even two or three years. In the meantime, the employees would be deprived of a wage adjustment to which they were admittedly entitled because of the July, 1953, major change in operations—this matter had been under study since the Spring of 1953 [Tr. 106]. Petitioner's labor supply would be jeopardized by its inability to meet competitive wage rates. Should both Petitioner and the employee be penalized by a frozen wage scale throughout the period necessary to resolve the legal conflict?

Petitioner did the only thing that it could reasonably do under the circumstances. It made unilateral wage increases.

For each of the above reasons, the Board's finding that Petitioner committed an unfair labor practice by granting a unilateral, general wage increase should be reversed.

Respectfully submitted,

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KENNETH N. DELLAMATER,

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No. 14824

**In the United States Court of Appeals
for the Ninth Circuit**

SEABOARD LEMON ASSOCIATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

**ON PETITION FOR REVIEW AND REQUEST FOR ENFORCEMENT
OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD**

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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FILE

MAR -1 1956

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No. 14824

SEABOARD LEMON ASSOCIATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

*ON PETITION FOR REVIEW AND REQUEST FOR ENFORCEMENT
OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD*

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of Seaboard Lemon Association to review and set aside an order of the National Labor Relations Board (R. 65-68)¹ issued against petitioner on April 13, 1955, following the usual proceedings under Section 10 (c) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Sec. 151, *et seq.*), hereafter called the Act. In its answer (R. 79-83) the Board has requested enforcement of its order. This Court has jurisdiction of the proceeding pursuant to Section

¹ References to portions of the printed record are designated "R." Wherever in a series of references a semicolon appears, references preceding the semicolon are to the Board's findings; succeeding references are to the supporting evidence.

10 (e) and (f) of the Act, the unfair labor practices having occurred at petitioner's plant in Oxnard, California, within this judicial circuit. The Board's decision and order are reported in 112 N. L. R. B. No. 21.

COUNTERSTATEMENT OF THE CASE

As more fully explained in the Board's brief (pp. 2-5) in No. 14840 on this Court's docket (*Santa Clara Lemon Association v. N. L. R. B.*), this is one of five cases before the Court in which the Board found that the employers, a group of independent nonprofit cooperatives engaged in processing and packing of citrus fruit in Southern California,² each committed unfair labor practices by refusing to deal with the Union³ which the Board certified as the representative of its employees, and also by unilaterally granting wage increases. Specifically, the Board based its unfair labor practice findings in this case on (1) petitioner's refusal to meet or deal further with the Union when, about four months after certification of the Union by the Board, it received a petition signed by a majority of its employees purporting to repudiate the Union as their bargaining representative, and (2) petitioner's subsequent conduct in increasing wages without negotiating with the Union. The evidentiary facts upon which the Board based its findings in this case may be summarized as follows:

² Petitioner, herein sometimes referred to as Seaboard, operates a packing plant in Oxnard, California, from which it ships a substantial amount of citrus fruit into interstate commerce (R. 41; 93). No jurisdictional issue is presented.

³ United Fresh Fruit & Vegetable Workers Union, L. I. U. No. 78, CIO, herein called the Union.

I. The Board's findings of fact

Following a representation election held pursuant to a consent election agreement (R. 1-5) at which the Union won a majority of the votes of Seaboard's employees, the Board certified the Union as bargaining representative of Seaboard's employees on November 13, 1953 (R. 42; 8-9). Thereafter, beginning on January 19, a series of seven meetings were held between Seaboard and the Union for the purpose of negotiating a collective bargaining agreement (R. 44; 97, 99-101). At these meetings the parties discussed the provisions of a proposed contract submitted by the Union and several counterproposals made by Seaboard (R. 44-45; 97-103). Tentative agreement was reached with respect to some matters, but no final contract was concluded (R. 45; 97, 102-103). The subject of wages was not discussed at these meetings (R. 45; 98-99). During the course of the seventh meeting, held on March 25, 1954, a uniformed constable interrupted negotiations to serve on Clarence Sewell, Seaboard's manager, a petition, signed by a majority of Seaboard's employees, in which they stated that they "no longer wish to be represented by the Union," and requested that thenceforward a committee of five named employees be recognized by Seaboard as their representative "in all bargaining matters" (R. 46; 101, 103-104, 24-25).

Manager Sewell, upon receiving the petition, immediately consulted with Seaboard's attorney, who was present at the meeting, and then told the Union representatives that negotiations would be suspended until he had checked the names on the petition against

a payroll list (R. 47; 101-102). Syd Rose, a Union field representative, replied that although the Union "had no objection to the checking of the petition," negotiations should nonetheless continue in view of the fact that the Union remained the certified bargaining representative (*ibid.*). Seaboard's representatives, however, declined to continue with negotiations, and the meeting ended (*ibid.*).

On March 29, 1954, counsel for Seaboard informed the Union by letter that "the signatures on the petition * * * all appear to be genuine" and that Seaboard would therefore "recognize the petition to the extent required by law" (R. 47-48; 35). The Union replied by mail on the following day, stating that its certification as bargaining representative of Seaboard's employees "is still valid," and requesting "resumption of collective bargaining at the earliest possible moment * * *" (R. 48; 35-36). Seaboard, however, refused to bargain or deal further with the Union (R. 48; 15).

On April 2, 1954, a few days after Seaboard broke off negotiations with the Union, it increased wages, without notifying or consulting with the Union, in amounts ranging from 20 to 30 cents an hour (R. 54; 94, 104-105).

II. The Board's conclusions and order

Upon the foregoing facts the Board concluded that Seaboard had violated Section 8 (a) (5) and (1) of the Act by refusing to negotiate with the Union and by unilaterally increasing wages (R. 65-66). To remedy the foregoing violations, the Board's order

requires Seaboard to cease and desist from refusing to bargain with the Union, under its new name acquired upon affiliation with the Packinghouse Workers of America,⁴ and from interfering in any related manner with its employees in the exercise of their right to organize and bargain through a union of their choice; affirmatively, the Board's order requires Seaboard to bargain collectively with the Union, as now affiliated, and to post appropriate notices (R. 66-68).

ARGUMENT

The Board's finding that petitioner violated Section 8 (a) (5) and (1) of the Act and its order requiring petitioner to bargain with the Union as now affiliated are valid and proper

Seaboard apparently concedes the correctness of the Board's ruling that it violated Section 8 (a) (5) and (1) of the Act by refusing to bargain with the Union upon receipt of the petition by which a majority of the employees purported to revoke the authority of the Union to represent them. See *Ray Brooks v. N. L. R. B.*, 348 U. S. 96. Thus, Seaboard makes only two contentions respecting the Board's findings and order: (1) that Seaboard was warranted in granting a wage increase without notifying or consulting the Union because bargaining negotiations had been "suspended" during the period that the propriety of Seaboard termination of negotiations was being adjudicated (Br. 6-8), and (2) that the Union's affiliation with

⁴ As fully explained in the Board's brief (pp. 13-15) in No. 14840, to which we respectfully refer the Court, the Union affiliated in July 1954 with the United Packinghouse Workers of America, CIO, and its certification as representative of Seaboard's employees was thereafter amended accordingly. (See R. 29-34.)

the Packinghouse Workers resulted in the formation of a new and different union from that certified by the Board, and that the Board's order is therefore invalid insofar as it requires Seaboard to bargain with the Union as now affiliated (Br. 5-6). These contentions are identical both in point of fact and law with those made by petitioner and fully discussed by the Board in its brief in Case No. 14840. Accordingly, rather than repeat the same discussion here, we respectfully refer the Board to the Board's brief in No. 14840 (pp. 25-38) for a statement of the reasons why we believe both contentions should be rejected.

CONCLUSION

The Board respectfully requests that its order be enforced in full.

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FEBRUARY 1956.

No. 14848

IN THE

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OXNARD CITRUS ASSOCIATION,*Petitioner,**vs.*

NATIONAL LABOR RELATIONS BOARD,

*Respondent,**and*

NATIONAL LABOR RELATIONS BOARD,

*Petitioner,**vs.*

OXNARD CITRUS ASSOCIATION,

Respondent.

Petition for Review and Petition for Enforcement of Order
of National Labor Relations Board.

Brief of Petitioner, Oxnard Citrus Association.

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FILE

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PAUL H. BROWN, J.

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OXNARD CITRUS ASSOCIATION,

Respondent.

Petition for Review and Petition for Enforcement of Order
of National Labor Relations Board.

Brief of Petitioner, Oxnard Citrus Association.

Preliminary Statement.

A. Jurisdiction.

The matter to which review is sought consists of a
Decision and Order dated April 13, 1955 [Tr. 74-76],¹

¹Transcript of Record.

made by the National Labor Relations Board (hereinafter called the "Board") in a proceeding entitled Oxnard Citrus Association (hereinafter called "Petitioner") and United Fresh Fruit & Vegetable Workers, LIU No. 78, CIO (hereinafter called the "Fruit & Vegetable Union") case number 21-CA-1909, holding that Petitioner had committed unfair labor practices and had refused to bargain with said union.

The Petition praying that the Order of the Board be set aside was filed under the provisions of Section 101.14 of the Rules and Regulations of the Board, and under the provisions of Section 10(f) of the Labor Management Relations Act, 1947, and in compliance with Rule 34 of the Rules of the United States Court of Appeals for the Ninth Circuit, as amended effective January 1, 1949.

The above Act of Congress, approved June 23, 1947, known and designated as the "Labor Management Relations Act, 1947" (29 U. S. C. A., Sec. 141), provides as follows as to review of this Order:

"Sec. 10(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside." (29 U. S. C. A., Sec. 160(f).)

B. Statement of the Case.

Petitioner is a California cooperative nonprofit association with its principal place of business in Port Hueneme, California, where it is engaged in processing and packing citrus fruits [Tr. 11, 14-15].

On November 4, 1953, Petitioner's employees elected said Fruit & Vegetable Union as their bargaining representative [Tr. 6]. On November 13, 1953, the Board certified said Fruit & Vegetable Union as the employees' exclusive bargaining representative [Tr. 8-9].

Bargaining meetings were held between Petitioner and said Fruit & Vegetable Union on December 2, 7, 15, 1953, January 7 and 14, 1954 [Tr. 60]. At the January 14, 1954 meeting an impasse was reached on the union shop question and bargaining was discontinued [Tr. 140-142]. On February 16, 1954, a petition signed by 65% of the employees and repudiating said Union was served on Petitioner [Tr. 62, 23-25]. Charges were filed by said Fruit & Vegetable Union against Petitioner on January 28, 1954, alleging refusal to bargain with said Union [Tr. 9-10]. Complaint was issued by the Board on or about May 27, 1954 [Tr. 11-14] and hearing was had before Trial Examiner Wallace E. Royster, in Oxnard, California, on September 27 and 28, 1954 [Tr. 59].

Petitioner filed written Exceptions to the Trial Examiner's Findings that Petitioner had committed unfair labor practices: (1) by refusal to bargain with said Fruit & Vegetable Union and subsequently with the United Pack-

inghouse Workers of America, Local 78, CIO (herein after referred to as the "Meatpackers Local") and (2) by granting a unilateral wage increase; and to his Recommendations that Petitioner, in the future, bargain with the said Meatpackers Local [Tr. 73-74].

The Board affirmed the Rulings and Recommendations of the Trial Examiner and ordered Petitioner to bargain with the said Meatpackers Local [Tr. 74-77].

Petitioner thereafter filed its Petition for Review with the above entitled court [Tr. 82].

C. Specifications of Error.

The Board erred in affirming the Findings, Conclusions and Recommendations of the Trial Examiner as follows: (1) that said Meatpackers Local is the exclusive bargaining representative of Petitioner's employees; (2) that Petitioner committed unfair labor practices by refusal to bargain with the said Meatpackers Local; (3) in recommending that in the future Petitioner bargain with said Meatpackers Local; (4) that Petitioner committed unfair labor practices by making unilateral wage increases; and (5) that Petitioner engaged in unfair labor practices within the meaning of 8(a) (1) and (5) of the Labor Management Relations Act [Tr. 74].

ARGUMENT.

I.

The Union Is Not the One Elected by the Employees and Is Not a Bargaining Representative of the Employees' "Own Choosing."

Employees have the statutory right "to bargain collectively through representatives of their own choosing." Section 7, Labor Management Relations Act, 1947, 29 U. S. C. A., Sec. 157).

The instant point is presented in support of Petitioner's Exceptions to the Board's Findings and Conclusions that Petitioner committed unfair labor practices by refusal to bargain with said Meatpackers Local and to the Board's Order that Petitioner:

" . . . Upon request, bargain collectively with United Packinghouse Workers of America, Local 78, CIO, as the exclusive representative of the employees in the appropriate unit described above, and if an understanding is reached embody such understanding in a signed agreement." [Tr. 76.]

The Unions involved herein, namely, the United Fresh Fruit & Vegetable Workers, LIU No. 78, the United Packinghouse Workers of America, CIO, an international union, and United Packinghouse Workers of America, Local 78, CIO, are the same unions that are referred to in the related case of Santa Clara Lemon Association, No. 14840.

The facts in this case are substantially the same on the above issue as the facts in the Santa Clara case. In the instant case the Board approved the substitution of the

Meatpackers' Local "For the reasons set forth in Santa Clara Lemon Association," etc. [Tr. 75, footnote 1].

Therefore, we incorporate herein by reference and make a part hereof as though set forth herein in full the argument appearing on pages 5 through 24 of the Brief of Petitioner, Santa Clara Lemon Association, filed with the above entitled court on or about December 31, 1955, in Case No. 14840.

For the reasons heretofore stated the Board's Order that Petitioner bargain collectively with said Meatpackers Local is contrary to law and in violation of the rights of the employees in the bargaining unit, and the Board's finding that Petitioner failed and refused contrary to the Act, to bargain with said Meatpackers Local should be reversed.

II.

Granting the Unilateral, General Wage Increase Did Not Constitute an Unfair Labor Practice.

It was stipulated that general wage increases were granted on March 8, 1954, and on April 19, 1954 [Tr. 126]. Petitioner admits that it did not consult the Union about the wage increase [Tr. 15, par. III].

The reasons for the wage increases and the circumstances surrounding them were explained in Petitioner's offer of proof [Tr. 162-163]. It is undisputed that there were no meetings between any Union and Respondent after January 14, 1954 [Tr. 158].

The Petitioner stood between the demands of the Fruit & Vegetable Union on one side, and the demands of a majority of its employees on the other. Wage adjustments were made to meet the competition of other packing houses. The new wage rates were ascertained by check-

ing with other packing houses to determine what they were paying. The wage increases were made retroactive to September 21, 1953, because that was the approximate time when competitive houses had made wage increases [Tr. 62].

The Trial Examiner considers that the purpose for which the wage increases were given is immaterial [Tr. 64]. The Board has not been so arbitrary. It has held that unilateral wage increases may be made when bargaining negotiations were in suspension.

In regard to the effect of a suspension of negotiations the Board declared:

“In these circumstances the Respondent was under no duty to withhold normal action respecting wages pending consultation with the Union.” (*Montgomery Ward & Co.*, 39 N. L. R. B. 229; *Westchester Newspapers, Inc.*, 26 N. L. R. B. 630)

In the instant case we have negotiations suspended both by an impasse and as a result of the conflicting demands of the Fruit & Vegetable Union on one side and of a majority of the employees and unusual circumstances on the other. How soon the difficulty would be resolved by the Board or by a court, or both, could not be foreseen. It might take a month, a year, or even two or three years. In the meantime the employees would be deprived of wage increases. Petitioner's labor supply would be jeopardized by its inability to meet competitive wage rates. Should both the employees and Petitioner be penalized by a frozen wage scale throughout the period necessary to resolve the legal conflict?

Petitioner did the only thing it reasonably could do under the circumstances. It made unilateral wage increases.

For each of the foregoing reasons the Board's finding that Petitioner committed an unfair labor practice by making a general wage increase without consulting the Union, is contrary to the law and should be reversed.

III.

Bargaining Had Reached a Genuine Impassé, and Petitioner's Refusal to Bargain Further Was Not an Unfair Labor Practice.

The evidence is undisputed that bargaining meetings between the Fruit & Vegetable Union and Petitioner were held on December 2, 7, 15, 1953, and January 7 and 14, 1954 [Tr. 100, 102, 104, 107, 127, 131, 133, 137-138].

First Meeting—December 2, 1953.

The Fruit & Vegetable Union distributed copies of the proposed contract [G. C. Ex. 3], and each article in the proposal was read and explained by said Union [Tr. 101-102, 127, 143]. Rose pointed out that all of said Union's existing contracts had a "Union shop" provision [Tr. 119]. The Union security and seniority provisions were discussed [Tr. 127-129]. Petitioner pointed out that maintenance of membership might be acceptable [Tr. 132]. Said Union pointed out that its members stood on the demand for a Union shop clause [Tr. 120]. It was indicated that the proposals on grievance procedure, arbitration, leaves of absence, men in the Armed Forces, safety, no strike—no lock-out, and some portions of the seniority clause could be worked out with little, or no difficulty [Tr. 121, 129]. There was no request by said Union or refusal by Petitioner to discuss wage rates [Tr. 117, 131].

Second Meeting—December 7, 1953.

The said Union proposal was reconsidered, and the sections entitled "Recognition," "Union Security" and "Representation" were discussed [Tr. 103-104]. Most of the meeting was devoted to discussing Union security [Tr. 104]. The Fruit & Vegetable Union pointed out that the "Union Security" clause was the most important clause in the whole contract [Tr. 132]. Petitioner explained its position on the Union shop question [Tr. 132-133]. Petitioner submitted a counterproposal on "Recognition" [Tr. 132, 145]. There was no discussion on wages, nor a demand by said Union nor refusal by Petitioner to discuss them [Tr. 133].

Third Meeting—December 15, 1953.

Petitioner submitted a revised counter-proposal on "Recognition" [Tr. 134, 105], and that section was settled [Tr. 134]. Union shop was discussed again [Tr. 118-119]. Smith, president of the Fruit & Vegetable Union, said that the Union was not interested in a maintenance of membership clause, and that he would not recede from the demand for a Union shop clause because the Fruit & Vegetable Union now had 300 contracts in existence, all of which had the Union shop provision [Tr. 135, 156]. When compromise was suggested, Smith said that he would not compromise on the Union shop question, and explained that you don't have to compromise if you feel you are right [Tr. 136].

Fourth Meeting—January 7, 1954.

Petitioner complained about the Union taking such an adamant position on the Union shop question. No progress was made on the issue, but it was finally agreed

that the Fruit & Vegetable Union submit the matter to its members and the Petitioner submit the matter to its Board of Directors to see if some basis for agreement could be reached [Tr. 137-138, 150].

Fifth Meeting—January 14, 1954.

Petitioner submitted counter-proposals on "Representation," "Union Security," and "Seniority" [G. C. Exs. 5, 6, 7], each of which was discussed [Tr. 108, 111, 140, 145]. Rose was asked if the Fruit & Vegetable Union had submitted the Union shop question to its membership as agreed at the last meeting [Tr. 139, 151]. Union representative Rose, who was absent from the fourth meeting [Tr. 120], stated that he had no knowledge of any such agreement, and Fruit & Vegetable Union representative Garcia stated that he had forgotten about it [Tr. 138, 152]. The Fruit & Vegetable Union stood pat on its Union shop demand, and Petitioner expressed its dissatisfaction with the Union's failure to resubmit the Union shop question to its members as agreed [Tr. 139, 152-153]. Petitioner had submitted the Union shop question to its Board of Directors, as agreed, and the Board indicated that it would not accept the Union shop proposal as offered by the Fruit & Vegetable Union, but that its negotiating committee should try to work out a compromise with said Union or find some common ground for agreement [Tr. 131, 150].

Petitioner indicated that agreement could be reached with little difficulty on recognition, representation, grievance procedure, arbitration, check-off, Armed Forces and transportation [Tr. 140].

Petitioner pointed out that the parties seemed to be getting no where on the Union security question; that

the parties keep coming back to that question, and seem to be up against a stone wall; and that Petitioner saw no use to continue arguing about the same thing or going back over the same ground that had been covered time and time again [Tr. 140-141]. Petitioner was asked if it was breaking off negotiations and replied that it was not breaking off negotiations but could see no use in arguing on the same point and saw no reason for continuing unless the said Union had something new to propose [Tr. 141-142].

Meetings Generally.

There were no meetings between the Fruit & Vegetable Union and Petitioner after January 14, 1954 [Tr. 158]. Prior to January 14, 1954, there was no refusal by Petitioner to meet with the Union [Tr. 125]. There was no refusal by Petitioner to discuss wages [Tr. 125].

The Fruit & Vegetable Union had requested that Petitioner present a full set of counter-proposals [Tr. 148-149, 160]. Petitioner explained why it would not present a complete set at one time [Tr. 149-150, 160]. However, counter-proposals were submitted on the most important subjects, including "Recognition" [Tr. 105], "Representation", "Union Security", and "Seniority" [Tr. 107-108, 111; G.C. Exs. 5, 6, 7]. The section which the Union said was most important to it was "Union Security" [Tr. 132]. Counter-proposals were submitted on each of the sections which was discussed following the first reading of the Union proposal [Tr. 146]. There was no refusal by Petitioner at any time to submit a counter-proposal on a specific subject [Tr. 160]. It is true that counter-proposals had not been submitted on "Working Conditions," "Vacations," "Hours and

Overtime,” “Combination Job,” “Wages” and “Insurance and Pensions,” but that was merely because negotiations had not progressed to those subjects [Tr. 146-147].

The Union shop question had been discussed, passed over, and discussed again on five or six occasions [Tr. 159, 148-149]. The Fruit & Vegetable Union had said on more than one occasion that it would not recede from its demand for a Union shop [Tr. 135-136, 156-157; G. C. Ex. 10, Tr. 54].

The Trial Examiner finds that:

“It may be, as the Respondent alleges, that bargaining on this matter had reached a point where further discussion made no promise of agreement.” [Tr. 63.]

Petitioner submits that when the Union shop question had been discussed and then passed over to other subjects in the contract and then discussed again, this having occurred five or six times with the Union’s refusal to recede from its demand for a Union shop, Petitioner was justified in abstaining from further negotiations. Nothing in the law requires that there be either an *impassé* or agreement on any or all other subjects of the contract before negotiations can be terminated by *impassé* on a given subject—especially on one as important as the Union shop question.

Although certain exemptions were demanded by Petitioner for the farm families of member-growers, that was a small factor in the Union security issue, and still a smaller factor in the seniority question [Tr. 154, 159]. Petitioner had at no time said that it would not recede or compromise on the farm family matter [Tr. 155].

In *N. L. R. B. v. Cambria Clay Products Co.* (C. A. 6, 1954), 215 F. 2d 48, 55, there was an *impassé* as a result

of a deadlock on the Union shop issue. In holding that employer did not refuse to bargain, the court said:

“ . . . There was no refusal on the part of the company—after four months of negotiations—to bargain with the Union in violation of the Act, for ‘the Act does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position.’ *National Labor Relations Board v. American National Insurance Co.*, 343 U. S. 395, 404, 72 S. Ct. 824, 829, 96 L. Ed. 1027.”

* * * * *

“When a genuine impasse is reached, an employer, unless conditions change, usually may abstain from further negotiations. *National Labor Relations Board v. Norfolk Shipbuilding and Drydock Corp.*, 4 Cir., 195 F. 2d 632, 635.”

* * * * *

“As said by Judge Learned Hand in *National Labor Relations Board v. Remington-Rand, Inc.*, 2 Cir., 94 F. 2d 862, 872: ‘the act does not attempt to settle industrial disputes; it leaves the parties to the resultant of their opposed economic powers; and while it does force them to treat with each other, it may be assumed to contemplate only bona fide negotiation. Hence it is no doubt true that it does not require further negotiation after it becomes apparent that a settlement is impossible. A Union may at times seek to give the appearance of wishing to treat, after it knows that all chance of agreement is gone; in such conflicts each side generally wishes to place the odium of rupture upon the other. Assuming, as urged by the Board, that a closed shop demand is a proper subject for bargaining, we do not believe that respondent was required to continue the discussion indefinitely. Both sides had endeavored for many months to agree and they were unable to do so.

Neither side was required to accept the proposal made by the other. The same thing may be said for other matters in dispute, which had long been considered and discussed by the parties. As stated, the occurrences of this date, when taken into consideration with what had preceded, as must be done, do not justify the conclusion of a refusal to bargain.' *National Labor Relations Board v. Algoma Plywood & Veneer Co.*, 7 Cir., 121 F. 2d 602, 606."

In *N. L. R. B. v. Algoma, etc.* (C. A. 7), 121 F. 2d 602, 606, where the deadlock was on the "closed shop" issue, the court held that there was no refusal to bargain and stated:

"During that period, as pointed out by the Board, numerous proposals and counter-proposals were made. The main stumbling block appears to have been the matter of the closed shop. Respondent proposed one kind of closed shop which the Union was either unable or unwilling to consummate, and the Union proposed another character of closed shop to which respondent would not agree. The Board states in its brief: * * * When the Union's proposals reached the conference table for collective bargaining on June 13, 1939, it at once became apparent that respondent persisted in the same motives, rendering any genuine collective bargaining impossible. * * *

"The fallacy of this reasoning is that the proposal had been on the conference table for 11 months.

"As we understand, the Union proposals at the June 13 conference were substantially the same as those proposed in numerous conferences prior thereto. In fact, one of the Union members testified, 'We were instructed to take that agreement back to Mr. Perry,' thereby referring to the previous proposal. A member of the bargaining committee testi-

fied that the conversation on this date was about the same as that had at previous conferences. In fact, as already stated, and as found by the Board, such bargaining conferences had continued over a period of 11 months. The length of time an employer must continue to bargain in order to demonstrate its good faith, we do not know, but certainly the time is not indefinite. Assuming, as urged by the Board, that a closed shop demand is a proper subject for bargaining, we do not believe that respondent was required to continue the discussion indefinitely. Both sides had endeavored for many months to agree and they were unable to do so. Neither side was required to accept the proposal made by the other. The same thing may be said for other matters in dispute, which had long been considered and discussed by the parties. As stated, the occurrences of this date, when taken into consideration with what had preceded, as must be done, do not justify the conclusion of a refusal to bargain."

In *N. L. R. B. v. Lightner Publishing Co.* (C. A. 7), 113 F. 2d 621, the court pointed out that the employer is not under a duty to accede to whatever particular terms may be sought by the Union, but merely to accord recognition to the bargaining representatives of the employees and conduct negotiations in good faith in an honest attempt to arrive at a mutually satisfactory agreement.

In *Shell Oil Co.*, 77 N. L. R. B. 1306, the Board held that inability to agree on one particular issue does not constitute refusal to bargain in good faith. In that case the employer met with the Union, discussed all proposals and counter-proposals and reached agreement on a substantial number of issues.

In *Southern Prison Co.*, 46 N. L. R. B. 1268, the Board found that there was no refusal to bargain in good faith where the company considered the Union's proposals, offered counter-proposals and even though the company had granted individual wage increases during the period of the negotiations, which were made without discrimination and pursuant to a long established policy of the company.

In *Kentucky Tennessee Clay Co.*, 49 N. L. R. B. 252, the Board held that there was no refusal to bargain where the parties were hopelessly deadlocked on the Union shop, seniority and arbitration issues.

In *Anchor Rome Mills, Inc.*, 86 N. L. R. B. 1120, the Board held that there was no failure to bargain where there was an impasse with respect to check-off, super-seniority for shop steward and union liability for strikes.

For each of the above reasons it is apparent that the Board's findings on said issue are not based on substantial evidence and should be reversed.

Respectfully submitted,

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No. 14838

**In the United States Court of Appeals
for the Ninth Circuit**

OXNARD CITRUS ASSOCIATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

**ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD**

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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FILE

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In the United States Court of Appeals for the Ninth Circuit

No. 14838

OXNARD CITRUS ASSOCIATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

*ON PETITION FOR REVIEW AND REQUEST FOR ENFORCEMENT
OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD*

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of Oxnard Citrus Association to review and set aside an order of the National Labor Relations Board (R. 75-77)¹ issued against petitioner on April 13, 1955, following the usual proceedings under Section 10 (c) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Sec. 151, *et seq.*), hereafter called the Act. In its answer (R. 79-83) the Board has requested enforcement of its order. This Court has jurisdiction of the proceeding pursuant to Section 10 (e) and (f) of the Act, the unfair labor practices

¹ Reference to portions of the printed record are designated "R." Wherever in a series of references a semicolon appears, references preceding the semicolon are to the Board's findings; succeeding references are to the supporting evidence.

having occurred at petitioner's plant in Oxnard, California, within this judicial circuit. The Board's decision and order are reported in 112 N. L. R. B. No. 19.

COUNTERSTATEMENT OF THE CASE

As more fully explained in the Board's brief (pp. 2-5) in No. 14840 on this Court's docket (*Santa Clara Lemon Association v. N. L. R. B.*), this is one of five cases before the Court in which the Board found that the employers, a group of independent nonprofit cooperatives engaged in processing and packing of citrus fruit in Southern California,² each committed unfair labor practices by breaking off bargaining negotiations with the certified representative of its employees,³ and also by unilaterally increasing wages. The evidentiary facts upon which the Board based its findings in this case may be summarized as follows:

I. The Board's findings of fact

A. The negotiations for a contract

Following a representation election held pursuant to a consent election agreement (R. 1-5), in which the Union won a majority of the votes of Oxnard's employees, the Board certified the Union as bargaining representative of Oxnard's employees on November 13, 1953 (R. 59-60; 8-9). Thereafter, the Union

² Petitioner, herein sometimes referred to as Oxnard, operates a packing plant in Oxnard, California, from which it ships a substantial amount of citrus into interstate commerce (R. 59; 97-98). No jurisdictional issue is presented.

³ United Fresh Fruit and Vegetable Workers Union, L. I. U., No. 78, CIO, herein called the Union.

and Oxnard met on five occasions for the purpose of negotiating a collective bargaining agreement (R. 60; 127, 131, 133, 137, 138). On the first of these occasions, December 2, 1953, the Union submitted a proposed contract, the provisions of which were read and explained (R. 60; 34-45; 101-102, 116, 127, 131). At each of the succeeding meetings, held at fortnightly intervals except during the Christmas holidays, the parties continued to negotiate with respect to the subject matters covered by the proposed contract (R. 60; 103-108, 110-112, 117-123, 131-142). Oxnard offered several counterproposals and it became apparent that there were many points upon which agreement could readily be reached (R. 60; 46-53, 110, 113-114, 121, 131-134). The parties, however, disagreed from the start with respect to the Union's request for a union shop clause, by which employees would be required to become Union members and pay dues and initiation fees as a condition of employment (R. 60; 34-35, 104, 106, 110, 120, 128, 132-133, 140). Another point of disagreement pertained to the Union's seniority proposal, which made no allowance for Oxnard's position that the families of the citrus growers whose products were processed and packed by Oxnard should "have first call on available jobs" (R. 60; 111, 123, 140, 154-155).

At the fifth meeting of the parties, on January 14, 1954, the parties again stated their opposing views on the foregoing matters, whereupon Oxnard's attorney, acting as its spokesman, stated that because of these differences "he did not feel that there was any use to continue these meetings" (R. 60; 112).

The Union's representative, Syd Rose, replied that "the fact that [the parties] were apart on these matters didn't call for the ending of [the] meetings, that [the parties] should continue in an effort to find those matters on which [they] are in agreement, and simply place these matters aside and continue to the next subject" (R. 60-61; 112). At this stage in negotiations there had not yet been any discussion of wages, hours, vacations, insurance or pension plans, arbitration, check off, and some of the other subjects contained in the contract originally proposed by the Union (R. 60; 112-113). Nonetheless, Oxnard "declined the offer of the Union to continue the meetings," and negotiations were ended (R. 61; 112).

A few days later, on January 18, Oxnard's attorney confirmed, in a telephone call to the Union, that Oxnard "had definitely broken off negotiations with the Union" (R. 61; 115). A month later, on February 19, the Union made an attempt to reinstitute contract discussions, but again Oxnard refused to meet with the Union, stating in a letter signed by its attorney that it could not see that "any good purpose would be served by continued bickering" (R. 61; 53-55). In a reply to this letter the Union stressed that it had "pointed out repeatedly during the discussions on the Union Shop that if we were able to negotiate a generally satisfactory agreement, the Union Shop matter would not stand in the way of our signing a contract" (R. 61-62; 55-56). The Union also emphasized its "willingness * * * to compromise", and again requested "that negotiations be

resumed at the earliest possible time" (*ibid.*). However, no further meetings were held (R. 61-62; 112).

On March 8, 1954, several weeks after Oxnard had terminated contract negotiations, and again on April 19, it increased wages without notifying or consulting with the Union (R. 62; 114, 126).

B. The attempt of a majority of the employees to revoke the Union's authority to represent them

On February 16, about a month after the last negotiating meeting between Oxnard and the Union, a petition signed by a majority of Oxnard's employees was served on Oxnard's manager in which the employees stated that they did "not wish to be represented any longer by the Union" (R. 62; 23). The petition named a committee of five employees whom Oxnard was requested to recognize as the employees' bargaining representative (*ibid.*).

Following receipt of the petition, Oxnard's manager authenticated the signatures thereon as those of its employees, and then referred the matter to Oxnard's attorney (R. 62; 162). The latter wrote the Union on April 8 that Oxnard would "recognize the petitions to the extent required by law" (R. 62; 57).

II. The Board's conclusions and order

Upon the foregoing facts the Board concluded that Oxnard had violated Section 8 (a) (5), and (1) of the Act by breaking off negotiations with the Union, by refusing to deal further with it, and by unilaterally granting a wage increase (R. 75). To remedy Oxnard's violations of the Act, the Board's order requires Oxnard to cease and desist from refusing to bargain

with the Union, under its new name acquired upon affiliation with the Packinghouse Workers of America,⁴ and from interfering with the efforts of the Union to represent its employees. Affirmatively, the Board's order requires Oxnard to bargain collectively with the Union as presently affiliated, and to post appropriate notices (R. 76-77).

ARGUMENT

The Board's findings that petitioner violated Section 8 (a) (5) and (1) of the Act and its order requiring petitioner to bargain with the Union as now affiliated are valid and proper

Two of the contentions made by Oxnard are common to the four other similar cases presently before the Court (see p. 2, *supra*): (1) that the Union's affiliation with the Packinghouse Workers resulted in the formation of a new and different union from that certified by the Board, and that the Board's order is therefore invalid insofar as it requires Oxnard to bargain with the Union as now affiliated (Br. 5-6), and (2) that while the issue of Oxnard's obligation to bargain with the Union was being adjudicated following its refusal to meet further with the Union, and thus negotiations were in effect "suspended," it was warranted in increasing wages without consulting the Union (Br. 6-8). These contentions are fully discussed in the Board's brief in Case No. 14840. Accordingly, rather than repeat the same discussion here, we respectfully refer the Court to the Board's

⁴ As explained in the Board's brief (pp. 13-15) in No. 14840, to which we respectfully refer the Court for a full statement of the facts, the Union affiliated in July, 1954 with the United Packinghouse Workers of America, CIO, and its certification as representative of Oxnard's employees was thereafter amended accordingly. See R. 28-34.

brief in No. 14840 (pp. 25-38) for a statement of the reasons why we believe both contentions should be rejected.

We turn then to the third contention made in this case, that Oxnard was justified in refusing to bargain with the Union following the meeting of January 14, 1954, nearly two months before granting the wage increase referred to above, because on that date the parties had reached an impasse in contract negotiations.

There is, of course, no requirement under the Act that parties must continue fruitless contract negotiations "in the face of a genuine impasse." *N. L. R. B. v. U. S. Cold Storage Corp.*, 203 F. 2d 924, 928 (C. A. 5). But the Board found in this case that no such "genuine impasse" had been reached by the parties (R. 63, 75), and there is ample evidence to support this finding. Thus, at the time that Oxnard refused to continue contract discussions upon the ground that the parties could not agree upon a provision for union security, there had been no negotiations with respect to many other important subjects, including wages, hours, vacations, arbitration, and insurance or pension plans (*supra*, p. 4). Until these matters had been explored it cannot be assumed that a possible willingness to compromise with respect to one or more of them would fail to induce a reciprocal attitude as to union security, and thus pave the way to an over-all settlement. It is common knowledge that in the give and take of good faith bargaining agreement ordinarily does not turn on a consideration of each contract proposal independently, but rather on compromise and concession resulting

from consideration of interdependent proposals. Indeed, Oxnard's representative recognized this when, during negotiations, he explained his submission of counterproposals on a piece-meal basis on the ground that "each new proposal or each clause that was settled on had a bearing on the other proposals" (R. 149-150). Accordingly, until negotiations had covered all important subjects in the bargaining relationship, it could not be said that "there has been a *bona fide* but unsuccessful attempt to reach an agreement," which, this Court has held to be prerequisite to a finding of impasse. *N. L. R. B. v. Andrew Jergens*, 175 F. 2d 130, 136 (C. A. 9), certiorari denied, 338 U. S. 827.

The decisions relied on by Oxnard (Br. 12-16) do not support its contrary contention that, where the parties have reached disagreement on a single subject early in bargaining, there is no need under the Act to continue discussions with respect to other subjects in an effort to find a basis for an overall agreement. In none of these cases were negotiations broken off until the parties had "explored the possibility of reaching agreement on *all proposals and counterproposals* submitted by the respective parties" (*Shell Oil Co.*, 77 N. L. R. B. 1306, 1308, cited on p. 15, *Oxnard's* brief, emphasis added).

Controlling in this respect is the Supreme Court's decision in *N. L. R. B. v. Crompton-Highland Mills*, 337 U. S. 217. In the *Crompton* case the employer and the union, following lengthy contract negotiations, "reached something of an impasse" (337 U. S. at 218) with respect to wages, whereupon the employer, sim-

ilar to Oxnard's action with respect to wages in this case, effected an increase without consulting the union and in an amount higher than any previous offer made to the union. In holding that the employer was not warranted in breaking off negotiations where he had not even discussed with the union the action he proposed to take unilaterally, the Court fully explained the requirement under the Act that negotiations continue until all basis for agreement with respect to all matters subject to bargaining has been exhausted (337 U. S. at p. 224):

We do not have here a case where the bargaining had come to a complete termination cutting off the outstanding invitation of the certified collective bargaining representative to bargain as to any new issue on such a matter as rates of pay * * * The opening which a raise in pay makes for the correction of existing inequities among employees and for the possible substitution of shorter hours, vacations or sick leaves, in lieu of some part of the proposed increase in pay, suggests the infinite opportunities for bargaining that are inherent in an announced readiness of an employer to increase generally the pay of its employees. The occasion is so appropriate for collective bargaining that it is difficult to infer an intent to cut off the opportunity for bargaining and yet be consistent with the purpose of the National Labor Relations Act.

That "the occasion [was] appropriate for collective bargaining" when Oxnard broke off relations in this case is particularly clear in view of the continued requests of the Union that the issue of union security

be put aside, and that the parties discuss other matters, such as wages, in an effort to find a basis for complete settlement (*supra*, p. 4). The likelihood of success, if such a procedure were followed in good faith, was foreshadowed by the demonstrated ability, which Oxnard concedes (Br. 19), of the parties to reach terms on many of the subjects they had discussed (*supra*, p. 3).⁵ Moreover, the Union had indicated during the course of negotiations that its bargaining position was open to compromise, even with respect to its request for a union shop (R. 110, 111, 156, 157). Under these circumstances, Oxnard's determination to terminate negotiations can be explained only as a "virtual insistence upon a prejudgment that no agreement could be reached by means of discussion," and not by the existence of a complete bargaining impasse, for there was none. *N. L. R. B. v. Jacobs Mfg. Co.*, 196 F. 2d 680, 683 (C. A. 2).

Finally, even apart from the bargaining situation which existed on January 14, 1955, after which Oxnard refused to meet with the Union, Oxnard was scarcely in a position to continue in its refusal fol-

⁵ Apart from union security, the only other matter on which there appeared to be substantial disagreement was the question of whether the family members of the citrus growers whose goods were processed by Oxnard should be entitled to job preference (R. 110-111). This question, however, was regarded by the parties as closely related to the union security issue, in view of the fact that under the Union's proposal such persons would have to become Union members (R. 128-129, 140, 154, 157). Moreover, the question was of no apparent practical importance, since there had been no employment by Oxnard of growers' families for the past eight or ten years (R. 155). And significantly, as Oxnard concedes (Br. 12), its representatives "at no time said that it would not recede or compromise on the farm family matter."

lowing the Union's letter of March 11. For in it the Union made explicit that if the parties "were able to negotiate a generally satisfactory agreement, the Union Shop matter would not stand in the way of * * * signing a contract" (R. 56). Moreover, in the same letter the Union emphasized its willingness to "recommend compromise on the Union Shop" and requested "that negotiations be resumed at the earliest possible time" (*ibid.*). Accordingly, whether or not Oxnard could have viewed the union shop issue as an insurmountable obstacle on January 14, it certainly had no basis for continuing that view after March 11. Its continuing refusal to meet with the Union after March 11 can thus in no event be justified on the ground that an impasse foreclosed the necessity of further negotiations. Compare, *N. L. R. B. v. Hill Stores*, 140 F. 2d 924 (C. A. 5); *Jeffery De-Witt v. N. L. R. B.*, 91 F. 2d 134, 139-140 (C. A. 4); certiorari denied, 302 U. S. 731.

CONCLUSIONS

For the foregoing reasons, the Board respectfully requests that its order be enforced in full.

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FEBRUARY 1956.

No. 14839

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SOMIS LEMON ASSOCIATION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

SOMIS LEMON ASSOCIATION,

Respondent.

Petition for Review and Petition for Enforcement of Order
of National Labor Relations Board.

Brief of Petitioner, Somis Lemon Association.

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Petition for Review and Petition for Enforcement of Order
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Preliminary Statement.

A. Jurisdiction.

The matter to which review is sought consists of a Decision and Order dated April 13, 1955 [Tr. 69-72],¹ made

¹Transcript of Record.

by the National Labor Relations Board (hereinafter called the "Board") in a proceeding entitled Somis Lemon Association (hereinafter called "Petitioner") and United Fresh Fruit & Vegetable Workers, LIU No. 78, CIO (hereinafter called the "Fruit & Vegetable Union"), case number 21-CA-1913, holding that Petitioner had committed unfair labor practices and had refused to bargain with the said Union.

The Petitioner praying that the Order of the Board be set aside was filed under the provisions of Section 101.14 of the Rules and Regulations of the Board, and under the provisions of Section 10(f) of the Labor Management Relations Act, 1947, and in compliance with Rule 34 of the Rules of the United States Court of Appeals for the Ninth Circuit, as amended, effective January 1, 1949.

The above Act of Congress, approved June 23, 1947, known and designated as the "Labor Management Relations Act, 1947" (29 U. S. C. A., Sec. 141), provides as follows as to review of this Order:

"Sec. 10(f). Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside." (29 U. S. C. A., Sec. 160(f).)

B. Statement of the Case.

Petitioner is a California cooperative non-profit association with its principal place of business in Oxnard, California, where it is engaged in processing and packing citrus fruits [Tr. 11-15].

On November 4, 1953, Petitioner's employees elected said Fruit & Vegetable Union as their bargaining representative [Tr. 6]. On November 13, 1953, the Board certified said Fruit & Vegetable Union as the employees' exclusive bargaining representative [Tr. 8-9].

Bargaining meetings were held between Petitioner and said Fruit & Vegetable Union on December 9, 1953, January 8, 21, and February 4, 1954 [Tr. 56]. An impasse was reached at the February 4, 1954, meeting and bargaining was discontinued [Tr. 126, 127, 129, 148, 156, 158-159]. On February 22, 1954, a petition signed by about 60% of the employees and repudiating said Union was served on Petitioner [Tr. 58, 129, 130, 24]. Charges were filed by said Fruit & Vegetable Union against Petitioner on February 8, 1954, alleging refusal to bargain with said Union [Tr. 9-10]. Complaint was issued by the Board on or about May 28, 1954 [Tr. 11-12] and hearing was had before Trial Examiner Wallace E. Royster, in Oxnard, California, on September 28 and 29, 1954 [Tr. 53-54].

Petitioner filed written Exceptions to the Trial Examiner's Findings that it committed unfair labor practices: (1) by refusal to bargain with said Fruit & Vegetable

Union; (2) by granting a unilateral wage increase, and (3) to his recommendations that petitioner bargain with the United Packinghouse Workers of America, Local No. 78, CIO (hereinafter referred to as the "Meatpackers Local") [Tr. 67-68].

The Board affirmed the Rulings and Recommendations of the Trial Examiner and ordered Petitioner to bargain with the said Meatpackers Local [Tr. 71].

Petitioner thereafter filed its Petition for Review with the above entitled court [Tr. 76].

C. Specifications of Error.

The Board erred in affirming the Findings, Conclusions and Recommendations of the Trial Examiner as follows: (1) that the said Meatpackers Local is the exclusive bargaining representative of Petitioner's employees; (2) that Petitioner committed unfair labor practices by refusal to bargain with the said Meatpackers Local; (3) in recommending that in the future Petitioner bargain with said Meatpackers Local; (4) that Petitioner committed unfair labor practices by making a unilateral wage increase; (5) that Petitioner engaged in unfair labor practices within the meaning of 8(a) (1) and (5) of the Labor Management Relations Act [Tr. 79-80].

ARGUMENT.

I.

The Union Is Not the One Elected by the Employees and Is Not a Bargaining Representative of the Employees' "Own Choosing."

Employees have the statutory right "to bargain collectively through representatives of their own choosing." (Sec. 7, Labor Management Relations Act, 1947, 29 U. S. C. A., Sec. 157.)

The instant point is presented in support of Petitioner's Exceptions to the Board's Findings and Conclusions that Petitioner committed unfair labor practices by refusal to bargain with said Meatpackers Local, and to the Board's Order that Petitioner:

"Upon request, bargain collectively with Union Packinghouse Workers of America, Local 78, CIO, as the exclusive representative of the employees in the appropriate unit described above, and if an understanding is reached embody such understanding in a signed agreement." [Tr. 71.]

The Unions involved herein, namely, the said Fruit & Vegetable Union, the said Meatpackers Local and the United Packinghouse Workers of America, CIO, an international union (hereinafter called the "Meatpackers International") are the same unions that are referred to in the related case of Santa Clara Lemon Association, No. 14840.

The facts in this case are substantially the same on the above issue as the facts in the *Santa Clara* case. In the

instant case the Board approved the substitution of the Meatpackers' Local "For the reasons set forth in Santa Clara Lemon Association," etc. [Tr. 70, footnote 1].

Therefore, we incorporate herein by reference and make a part hereof as though set forth herein in full the argument appearing on pages 5 through 24 of the Brief of Petitioner, Santa Clara Lemon Association, filed with the above entitled court on or about December 31, 1955 in Case No. 14840.

For the reasons heretofore stated the Board's Order that Petitioner bargain collectively with the said Meatpackers Local is contrary to law and in violation of the rights of the employees in the bargaining unit, and the Board's finding that Petitioner failed and refused, contrary to the Act, to bargain with the Meatpackers Local should be reversed.

II.

Granting the Unilateral, General Wage Increase Did Not Constitute an Unfair Labor Practice.

It was stipulated that general wage increases were granted on March 8, 1954, and on April 11, 1954 [Tr. 109]. Petitioner admits that it did not consult any Union about the wage increases [Tr. 103, 155].

The reasons for the wage increases and the circumstances surrounding them were explained in Petitioner's offer of proof [Tr. 130-132].

Petitioner stood between the demands of the said Fruit & Vegetable Union on one side and the demands of a majority of its employees on the other. Wage adjustments were made to meet the competition of other packing houses [Tr. 132]. The new wage rates of \$1.15

for women and \$1.35-\$1.40 for men [Tr. 109] were established by ascertaining what other packing houses in the area were paying [Tr. 132].

The Trial Examiner considers that the purpose is immaterial even though the wage increase was made solely because of business necessity [Tr. 60]. The Board has not been so arbitrary. It has held that unilateral wage increases may be made when bargaining negotiations were in suspension.

In regard to the effect of a "suspension" of negotiations, the Board declared:

"In these circumstances the respondent was under no duty to withhold normal action respecting wages pending consultation with the Union." (*Montgomery Ward & Co.*, 39 N. L. R. B. 229; *Westchester Newspapers, Inc.*, 26 N. L. R. B. 630)

In the instant case we have negotiations suspended as a result of an impasse. How soon the difficulty would be resolved by the Board, or by a court, or both, could not be foreseen. It might take a month, a year, or even two or three years. In the meantime the employees would be deprived of a wage increase. Petitioner's labor supply would be jeopardized by its inability to meet competitive wage rates. Should both Petitioner and the employees be penalized by a frozen wage scale throughout the period necessary to resolve the legal conflict?

Petitioner did the only thing that it could reasonably do under the circumstances. It made unilateral wage increases [Tr. 132].

For each of the above reasons there is no substantial evidence to support the Board's finding that Petitioner violated the Act by granting a unilateral wage increase.

III.

Bargaining Had Reached a Genuine Impassé, and Petitioner's Refusal to Bargain Further Was Not an Unfair Labor Practice.

The evidence is undisputed that bargaining meetings between the Fruit & Vegetable Union and Petitioner were held on December 9, 1953, January 8, January 21, and February 4, 1954 [Tr. 93-94-95, 98].

First Meeting—December 9, 1953.

The Fruit & Vegetable Union representative, Rose, was absent [Tr. 93, 110]. The chief shop stewards from each of the competitive packing houses were present [Tr. 110-111, 134]. Petitioner pointed out that certain of the shop stewards present were employees of competitive packing houses, and expressed its dissatisfaction with having representatives of competitors sitting in on its business meetings. However, Petitioner did not press the matter further [Tr. 111]. Copies of said Fruit & Vegetable Union proposal were distributed. The Fruit & Vegetable Union proposal was read and several questions were asked by the Petitioner [Tr. 111-112]. The shop stewards who were present pointed out that they did not have sufficient knowledge as to the meaning of various parts of the Fruit & Vegetable Union proposal and said they could not answer several questions of the Petitioner and could not fully explain the proposal. Therefore, it was agreed that the entire matter be put over to the next meeting, when Mr. Smith, the president of the Fruit & Vegetable Union, or Mr. Rose, would be present [Tr. 112, 133-134].

Second Meeting—January 8, 1954.

Mr. Rose was present to represent the Fruit & Vegetable Union, but his recollection of what occurred appears to have been in error in several respects. Rose testified that the Fruit & Vegetable Union proposal was read in full at the first meeting and not read at all at the second [Tr. 95]. Yet he admits that Mr. Smith, president of said Union, may have read the proposal at the second meeting [Tr. 106], and other witnesses testified that the proposal was read in whole by Smith, president of said Union, and discussed as each section was read [Tr. 113-114, 135-136]. Rose testified that Petitioner pointed out that it wanted the overtime exemption allowed under the "State Agricultural Code" [Tr. 94, 102], and that after checking into the matter the Fruit & Vegetable Union agreed to the Petitioner using the overtime exemptions provided in the "State Agricultural Code" [Tr. 102]. Yet the evidence showed that the exemption referred to was allowed under the Federal Wage and Hour Law and not under the State Agricultural Code [G. C. Ex.* 4, Tr. 46, 105]. Rose was also in error as to the parties present at the second meeting [Tr. 106].

Seniority was discussed [Tr. 94]. The Fruit & Vegetable Union requested that Petitioner submit its counter-proposals in full [Tr. 94, 101].

During the course of the meeting, many questions were asked by Petitioner's representatives and explained by Rose or Smith [Tr. 114]. The subjects discussed included Union shop, wages, hours and overtime, federal exemption as to overtime in the handling of perishable fruits,

*General Counsel's Exhibit.

holidays [Tr. 114-115, 141], wage classifications [Tr. 116], insurance, working conditions, variation in wage rates [Tr. 140-141], and union indemnity in case of its violation of the proposed no strike, no lockout clause [Tr. 138-139].

There was agreement in substance concerning leaves of absence, men in Armed Forces, transportation, safety, no strike no lockout [Tr. 135-138], and it was not expected that there would be any difficulty in reaching an agreement on grievance procedure [Tr. 148].

The Fruit & Vegetable Union indicated that it was uncertain as to who among its own group had suggested the proposed wage rates and classifications [Tr. 117]. The Fruit & Vegetable Union said that it would not discuss wages alone [Tr. 116, 141].

The Petitioner opposed the use of the check-off system [Tr. 151]. The Fruit & Vegetable Union asked for a complete set of Petitioner's counter proposals [Tr. 142].

Third Meeting—January 21, 1954.

The Fruit & Vegetable Union representative, Rose, testified as to this meeting and again his recollection appeared to be in error in several respects. Rose testified that counsel for Petitioner submitted a counter-proposal on hours and overtime [Tr. 95]. Yet he admitted that he might be mistaken as to whether or not counsel was present at the meeting [Tr. 107], and other evidence indicated that counsel was not present at the meeting [Tr. 117-118]. Rose testified that he repeated his request for a full set of Petitioner's counter-proposals, and erroneously stated that Petitioner's counsel refused at this meeting to submit counter-proposals in full [Tr. 95-96, 101, 142].

The subjects discussed included combination jobs [Tr. 96], a counter-proposal on hours and overtime, seniority, the exception of growers' farm families from the seniority clause, and the Union shop [Tr. 96].

Petitioner submitted counter-proposals on hours and overtime [G. C. Ex. 4, Tr. 46, 119, 141], and on seniority [G. C. Ex. 5, Tr. 47, 119-120, 141]. Rose stated that at the next meeting he would offer a Union counter-proposal on seniority, and Petitioner said that it would reconsider the counter-proposal which it had offered on seniority [Tr. 120]. Also discussed were combination jobs [Tr. 120-121] and the federal wage and hour overtime exemption [G. C. Ex. 4, Tr. 46, 118]. It appeared that there was a meeting of the minds on arbitration [Tr. 149].

Rose stated that it was necessary for the Fruit & Vegetable Union to have the Union shop provision in the contract but Petitioner replied that it did not feel that it should force people to join the said Fruit & Vegetable Union in order to hold their jobs [Tr. 119].

Rose requested that Petitioner submit a full set of counter-proposals and Petitioner replied that it would submit counter-proposals on the various subjects which appeared in the Fruit & Vegetable Union proposal but that for it to submit a full set of counter-proposals at one time would result in an unnecessary loss of work [Tr. 122].

Fourth Meeting—February 4, 1954.

Rose submitted an oral counter-proposal on seniority [Tr. 98, 123-124]. McDaniel (counsel for Petitioner) submitted a counter-proposal on the Union Shop [G. C. Ex. 6, Tr. 47, 98] and the Fruit & Vegetable Union rejected it [Tr. 99, 127].

Union security was discussed and had also been previously discussed at the first, second and third meetings [Tr. 125]. Rose explained that the Fruit & Vegetable Union had 200 or 300 contracts in existence and they each contained the Union shop clause. He said that the Union shop clause was the policy of the Fruit & Vegetable Union in all of its contracts and that the Fruit & Vegetable Union would not recede from that position. Petitioner explained that it did not believe employees should be forced to join the Fruit & Vegetable Union against their will [Tr. 125-126]. McDaniel asked Rose if the Fruit & Vegetable Union would recede from its demand for a Union shop and Rose said that he could not recede because it was the policy of the Fruit & Vegetable Union to have the Union Shop clause in its contract [Tr. 126].

McDaniel said that he did not see any use in proceeding further in view of the Fruit & Vegetable Union's position and he rejected Rose's suggestion to pass the Union shop subject and to continue for an area of agreement because the Union shop had previously been discussed at all meetings. McDaniel told Rose to contact him if there was any change in the Fruit & Vegetable Union's position [G. C. Ex. 9, Tr. 49, 126, 127, 129, 148, 153, 156, 158-159].

Meetings—Generally.

Seniority and Union shop were discussed at each of the meetings [Tr. 103, 155-156]. There was agreement in substance on leaves of absence, Armed Forces, transportation, safety, hours and overtime, combination jobs, and recognition [Tr. 127-128], but parties always returned to the Union shop question [Tr. 125].

Petitioner did not want to agree on seniority based on length of service alone [Tr. 144]. But Petitioner's counter-proposal on seniority [G. C. Ex. 5, Tr. 47] was made in the form presented in order that Petitioner would be protected so that during slow periods it could discharge or lay off employees who had less ability and were less efficient without the complication of length of service. Petitioner fully expressed its intentions and its interpretation of the counter-proposal to the said Fruit & Vegetable Union [Tr. 146-148].

There was only one counter-proposal submitted on the Union shop question. Petitioner wanted an open shop clause and the Fruit & Vegetable Union wanted a Union Shop clause [Tr. 147]. The Fruit & Vegetable Union did not offer to recede from its demand for a Union shop clause [Tr. 148]. Petitioner asked Rose on more than one occasion if he would recede from his remand for a Union shop and Rose said several times that all of the Fruit & Vegetable Union's other contracts had the Union shop clause and that the Fruit & Vegetable Union could not accept anything less than that [Tr. 148].

The above summary of the various meetings indicates clearly that the Union shop question was discussed at all of the meetings, was passed over while other subjects were discussed, and was again discussed on several occasions. The Fruit & Vegetable Union had made it clear that it did not intend to recede from its demand for a Union shop.

The Trial Examiner finds that:

"I find that on February 4 bargaining between the parties had not reached a point of *impassé* in respect to wages, vacations, working conditions, and other

subsidiary questions; that the Union by virtue of its representative status was entitled to an opportunity to attempt to persuade the Respondent to the point of agreement in these matters; and that refusal further to meet with the Union after that date foreclosed it from doing so.” [Tr. 59.]

Petitioner submits that when the Union shop question had been discussed and then passed over to other subjects in the contract, and then discussed again, this having occurred at several meetings, and the Fruit & Vegetable Union continued to refuse to recede from its demand for a Union shop, Petitioner was justified in abstaining from further negotiations. Nothing in the law requires that there be either an *impassé* or agreement on any or all other subjects of the contract before negotiations can be terminated by *impassé* on a given subject—especially on one as important as the Union shop question.

In *N. L. R. B. v. Cambria Clay Products Co.* (C. A. 6, 1954), 215 F. 2d 48, 55, there was an *impassé* as a result of a deadlock on the Union shop issue. In holding that employer did not refuse to bargain, the court said:

“ . . . There was no refusal on the part of the company—after four months of negotiations—to bargain with the Union in violation of the Act for ‘the Act does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position.’ *National Labor Relations Board v. American National Insurance Co.*, 343 U. S. 395, 404, 72 S. Ct. 824, 829, 96 L. Ed. 1027.”

“When a genuine impasse is reached, an employer, unless conditions change, usually may abstain from further negotiations. *National Labor Relations Board v. Norfolk Shipbuilding and Drydock Corp.*, 4 Cir., 195 F. 2d 632, 635.”

* * * * *

“As said by Judge Learned Hand in *National Labor Relations Board v. Remington-Rand, Inc.*, 2 Cir., 94 F. 2d 862, 872: ‘the act does not attempt to settle industrial disputes; it leaves the parties to the resultant of their opposed economic powers; and while it does force them to treat with each other, it may be assumed to contemplate only bona fide negotiation. Hence, it is no doubt true that it does not require further negotiation after it becomes apparent that a settlement is impossible. A Union may at times seek to give the appearance of wishing to treat, after it knows that all chance of agreement is gone; in such conflicts each side generally wishes to place the odium of rupture upon the other. Assuming, as urged by the Board, that a closed shop demand is a proper subject for bargaining, we do not believe that respondent was required to continue the discussion indefinitely. Both sides had endeavored for many months to agree and they were unable to do so. Neither side was required to accept the proposal made by the other. The same thing may be said for other matters in dispute, which had long been considered and discussed by the parties. As stated, the occurrences of this date, when taken into consideration with what had preceded, as must be done, do not justify the conclusion of a refusal to bargain.’ *National Labor Relations Board v. Algoma Plywood & Veneer Co.*, 7 Cir., 121 F. 2d 602, 606.”

In *N. L. R. B. v. Algoma, etc.* (C. A. 7), 121 F. 2d 602, 606, where the deadlock was on the “closed shop”

issue, the court held that there was no refusal to bargain and stated:

“During that period, as pointed out by the Board, numerous proposals and counter-proposals were made. The main stumbling block appears to have been the matter of the closed shop. Respondent proposed one kind of closed shop which the Union was either unable or unwilling to consummate, and the Union proposed another character of closed shop to which respondent would not agree. The Board states in its brief: ‘* * * When the Union’s proposal reached the conference table for collective bargaining on June 13, 1939, it at once became apparent that respondent persisted in the same motives, rendering any genuine collective bargaining impossible. * * *.’

“The fallacy of this reasoning is that the proposal had been on the conference table for 11 months.

“As we understand, the Union proposals at the June 13 conference were substantially the same as those proposed in numerous conferences prior thereto. In fact, one of the Union members testified: ‘We were instructed to take that agreement back to Mr. Perry,’ thereby referring to the previous proposal. A member of the bargaining committee testified that the conversation on this date was about the same as that had at previous conferences. In fact, as already stated, and as found by the Board, such bargaining conferences had continued over a period of 11 months. The length of time an employer must continue to bargain in order to demonstrate its good faith, we do not know, but certainly the time is not indefinite. Assuming, as urged by the Board, that a closed shop demand is a proper subject for bargaining, we do not believe that respondent was required to continue the discussion indefinitely. Both sides had endeavored for many months to agree and they

were unable to do so. Neither side was required to accept the proposal made by the other. The same thing may be said for other matters in dispute, which had long been considered and discussed by the parties. As stated, the occurrences of this date, when taken into consideration with what had preceded, as must be done, do not justify the conclusion of a refusal to bargain."

In *N. L. R. B. v. Lightner Publishing Co.* (C. A. 7), 113 F. 2d 621, the court pointed out that the employer is not under a duty to accede to whatever particular terms may be sought by the Union, but merely to accord recognition to the bargaining representatives of the employees and conduct negotiations in good faith in an honest attempt to arrive at a mutually satisfactory agreement.

In *Shell Oil Co.*, 77 N. L. R. B. 1306, the Board held that inability to agree on one particular issue does not constitute refusal to bargain in good faith. In that case the employer met with the Union, discussed all proposals and counter-proposals and reached agreement on a substantial number of issues.

In *Southern Prison Co.*, 46 N. L. R. B. 1268, the Board found that there was no refusal to bargain in good faith where the company considered the Union's proposals, offered counter-proposals and even though the company had granted individual wage increases during the period of the negotiations, which were made without discrimination and pursuant to a long established policy of the company.

In *Kentucky Tennessee Clay Co.*, 49 N. L. R. B. 252, the Board held that there was no refusal to bargain where the parties were hopelessly deadlocked on the Union shop, seniority and arbitration issues.

In *Anchor Rome Mills, Inc.*, 86 N. L. R. B. 1120, the Board held that there was no failure to bargain where there was an impasse with respect to check-off, super-seniority for shop steward and Union liability for strikes.

For each of the above reasons it is apparent that the Board's findings on said issues are not based on substantial evidence and are not in accordance with law, and therefore should be reversed.

Respectfully submitted,

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No. 14839

**In the United States Court of Appeals
for the Ninth Circuit**

SOMIS LEMON ASSOCIATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

**ON PETITION FOR REVIEW AND REQUEST FOR ENFORCEMENT
OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD**

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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FILED

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of Somis Lemon Association to review and set aside an order of the National Labor Relations Board (R. 70-72)¹ issued against petitioner on April 13, 1955, following the usual proceeding under Section 10 (c) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Sec. 151, *et seq.*), hereafter called the Act. In its answer (R. 79-83) the Board has requested enforcement of its order. This Court has jurisdiction of the proceeding pursuant to Section 10 (e) and (f)

¹ References to portions of the printed record are designated "R." Wherever in a series of references a semicolon appears, reference preceding the semicolon are to the Board's findings; succeeding references are to the supporting evidence.

of the Act, the unfair labor practices having occurred at petitioner's plant in Oxnard, California, within this judicial circuit. The Board's decision and order are reported in 112 NLRB No. 18.

COUNTERSTATEMENT OF THE CASE

As more fully explained in the Board's brief (pp. 2-5) in No. 14840 on this Court's docket (*Santa Clara Lemon Association v. N. L. R. B.*), this is one of five cases before the Court in which the Board found that the employers, a group of independent non-profit co-operatives engaged in processing and packing of citrus fruit in Southern California,² each committed unfair labor practices by breaking off negotiations with the Union³ which the Board certified as the representative of its employees, and also by unilaterally increasing wages. The evidentiary facts upon which the Board based its findings in this case may be summarized as follows:

I. The Board's findings of fact

A. The contract negotiations

Following a representation election held pursuant to a consent election agreement (R. 1-5) in which the Union won a majority of the votes of Somis' employees, the Board certified the Union as bargaining representative of Somis' employees on November 13, 1953 (R. 55; 9). Thereafter, beginning on De-

² Petitioner, herein sometimes referred to as Somis, operates a packing plant in Oxnard, California, from which it ships a substantial amount of citrus fruit into interstate commerce (R. 55; 107-108). No jurisdictional issue is presented.

³ United Fresh Fruit & Vegetable Workers Union, L. I. U. No. 78, CIO, herein called the Union.

cember 9, 1953, a series of four meetings were held between Somis and the Union for the purpose of negotiating a collective bargaining agreement (R. 56; 93-95, 98, 109, 112, 117, 122). At the first of these meetings the Union submitted a proposed written contract, the provisions of which became the basis for negotiation in all succeeding meetings (R. 56; 34-46, 111-112). During the course of these meetings, Somis submitted counterproposals with respect to some subjects, and the Union withdrew or modified its original demands as to other subjects (R. 56, 58-59; 46-48, 96, 98, 102, 119-120, 142-143). Tentative agreement was reached on proposals dealing with recognition and hours and the parties appeared to be fairly close to agreement with respect to other matters (R. 96, 102, 122, 128, 135-137, 149). The Union's request for a union shop provision, however, was flatly rejected by Somis, and disagreement also developed over the Union's seniority proposal and Somis' request that the family members of growers whose produce was handled at the plant be given job preference (R. 56; 95, 96-97, 114, 119-190).

At the fourth meeting, held on February 4, 1954, the Union made concessions from its original positions respecting both seniority and job preference for family member of growers, but Somis rejected the new proposals, and in turn offered a counterproposal with respect to union security which forbade any sort of compulsory unionism on the stated ground that "monopolistic Union practices will interfere with [Somis'] operations" (R. 56; 47-48, 98-99, 127). When the Union refused to incorporate this language

into a contract, Somis' principal spokesman, its attorney, stated that he "did not see any use in proceeding further," and, in answer to a direct question by the Union, indicated that Somis "was breaking off negotiations" (R. 56; 99, 126, 129, 152-153). The Union requested that the parties "simply put aside those subjects upon which [they] could not agree and . . . continue to search for an area of agreement in the other contract articles which we had not yet explored" (R. 56; 99). At that stage of the negotiations the parties had not yet reached serious discussion on many of the subjects contained in the Union's proposed contract, including wages, vacations, and working conditions (R. 59; 99-100, 140-141, 151). This suggestion was rejected, however, and the meeting ended (R. 56; 99, 152-153).

On February 19, 1954, the Union by a letter to Somis, requested "prompt resumption of negotiations," but Somis replied a week later that in view of the disagreement between the parties as to the union security and seniority issues "further discussions would be useless," and that no "good purpose would be served by continued bickering" (R. 56-57; 49-50). The Union wrote Somis a final letter on March 11, stating that it had "informed you several times that [it] would recommend compromise on both [the union shop and seniority] issues when [it] could advise [its] membership that [the parties] had reached an otherwise satisfactory agreement" (R. 57; 51). Again stressing "the willingness of the Union to compromise," the letter repeated the Union's

earlier request "that negotiations be resumed at the earliest possible time" (R. 57; 51-52). However, no further meetings were held (R. 56).

On March 8 and again on April 11, 1954, Somis increased wages in amounts ranging from 10 cents to 25 cents an hour, on both occasions without notifying or consulting the Union (R. 58; 103, 155).

B. A majority of the employees attempt to revoke the authority of the Union to represent them

On February 22, about two and a half weeks after Somis had terminated contract negotiations with the Union, a petition signed by a majority of Somis' employees was served on Somis' manager in which the employees stated that they did "not wish to be represented any longer by the Union" (R. 58; 24, 129). The petition named a committee of five employees whom Somis was requested to recognize as the employees' bargaining representative (R. 25).

Following receipt of the petition, Somis' manager checked the signatures contained thereon against a payroll, and, having satisfied himself that a majority of Somis' employees had in fact signed the document, referred the matter to Somis' attorney (R. 58; 130). The latter wrote the Union on April 8, 1954, that Somis would "recognize the petition to the extent required by law" (R. 53).

II. The Board's conclusions and order

Upon the foregoing facts the Board concluded that Somis had violated Section 8 (a) (5) and (1) of the Act by breaking off negotiations with the Union,

by refusing further to deal with it, and by unilaterally granting a wage increase (R. 69-70). To remedy Somis' violations of the Act, the Board's order requires Somis to cease and desist from refusing to bargain with the Union, under its new name acquired upon affiliation with the Packinghouse Workers of America,⁴ and from interfering with the efforts of the Union to represent its employees. Affirmatively, the Board's order requires Somis to bargain collectively with the Union, as presently affiliated, and to post appropriate notices (R. 70-72).

ARGUMENT

The Board's findings that petitioner violated Section 8 (a) (5) and (1) of the Act and its order requiring petitioner to bargain with the Union as now affiliated are valid and proper

Two of the contentions made by Somis are common ~~both~~ to the four other similar cases presently before the Court: (1) that the Union's affiliation with the Packinghouse Workers resulted in the formation of a new and different union from that certified by the Board, and that the Board's order is therefore invalid insofar as it requires Somis to bargain with the Union as now affiliated (Br. 5-6), and (2) that while the issue of Somis' obligation to bargain with the Union was being adjudicated following its refusal to meet further with the Union, and negotiations were thus in

⁴ As explained in the Board's brief (pp. 13-15) in No. 14840, to which we respectfully refer the Court for a full statement of the facts, the Union affiliated in July 1954, with the United Packinghouse Workers of America, CIO, and its certification as representative of Somis' employees was thereafter amended accordingly. See R. 29-35.

effect "suspended," it was warranted in increasing wages without consulting the Union (Br. 6-8). These contentions are fully discussed in the Board's brief in Case No. 14840. Accordingly, rather than repeat the same discussion here, we respectfully refer the Court to the Board's brief in No. 14840 (pp. 25-28) for a statement of the reasons why both contentions should be rejected.

A third contention made by Somis—that a genuine impasse had been reached at the meeting of February 4, 1954, in the bargaining between it and the Union which warranted termination of negotiations—must be appraised in the light of the particular facts of this case. A comparison, however, of the contract negotiations of this case with those in the *Oxnard* case, No. 14838, shows that they are substantially the same in detail, and identical in legal effect.

Thus here, as in *Oxnard*, when the employer broke off negotiations the parties had reached tentative agreement on some matters, were close to agreement on others, and had not even discussed many of the important provisions, including that dealing with wages, contained in the Union's proposed contract (*supra*, 4). In both cases the employer refused to continue negotiations because of disagreement with respect to one or two of the proposed clauses (*supra*, p. 4). And similarly, in both cases, the employers' refusal persisted in the face of the Union's suggestion that a basis for settlement be sought in other matters which had not been discussed, and even after the Union had written the employers that it was willing

to compromise its position on the matters in disagreement (*supra*, pp. 4-5).⁵

Accordingly, the initial question in both cases is whether the good faith bargaining requirements of the Act permit a party to break off contract negotiations on the ground that an impasse has been reached whenever there is an unresolved disagreement on a contract proposal, even though the parties have not yet discussed many of the subjects to be covered by their contract. Secondly and also common to both cases, is the question of whether one of the negotiating parties may continue to refuse to meet with the other on the ground that there has been an impasse in their discussions after the other has stated a willingness to compromise on the disputed subject. We show in our brief in the *Oxnard* case, No. 14838, that both questions must be answered in the negative; that a genuine impasse does not exist either where the parties have not explored a basis for agreement in undiscussed subject matter or where one of the parties has expressed a willingness to compromise a position that had earlier led to disagreement. Accordingly, we respectfully refer the Court to the Board's brief (pp. 7-11) in the *Oxnard* case, for a discussion of the reasons and authorities supporting the Board's conclusion in this case that Somis committed an unfair labor practice when it permanently discontinued contract negotiations with the Union.

⁵ Somis' assertion (Br. 13) that the Union "did not offer to recede from its demand for a Union shop clause" cannot be squared with the Union's letter to Somis of March 11, 1954, in which the Union expressly offered to compromise its position on this and other controversial issues. *Supra*, pp. 4-5.

CONCLUSION

It is respectfully requested that the Board's order be enforced in full.

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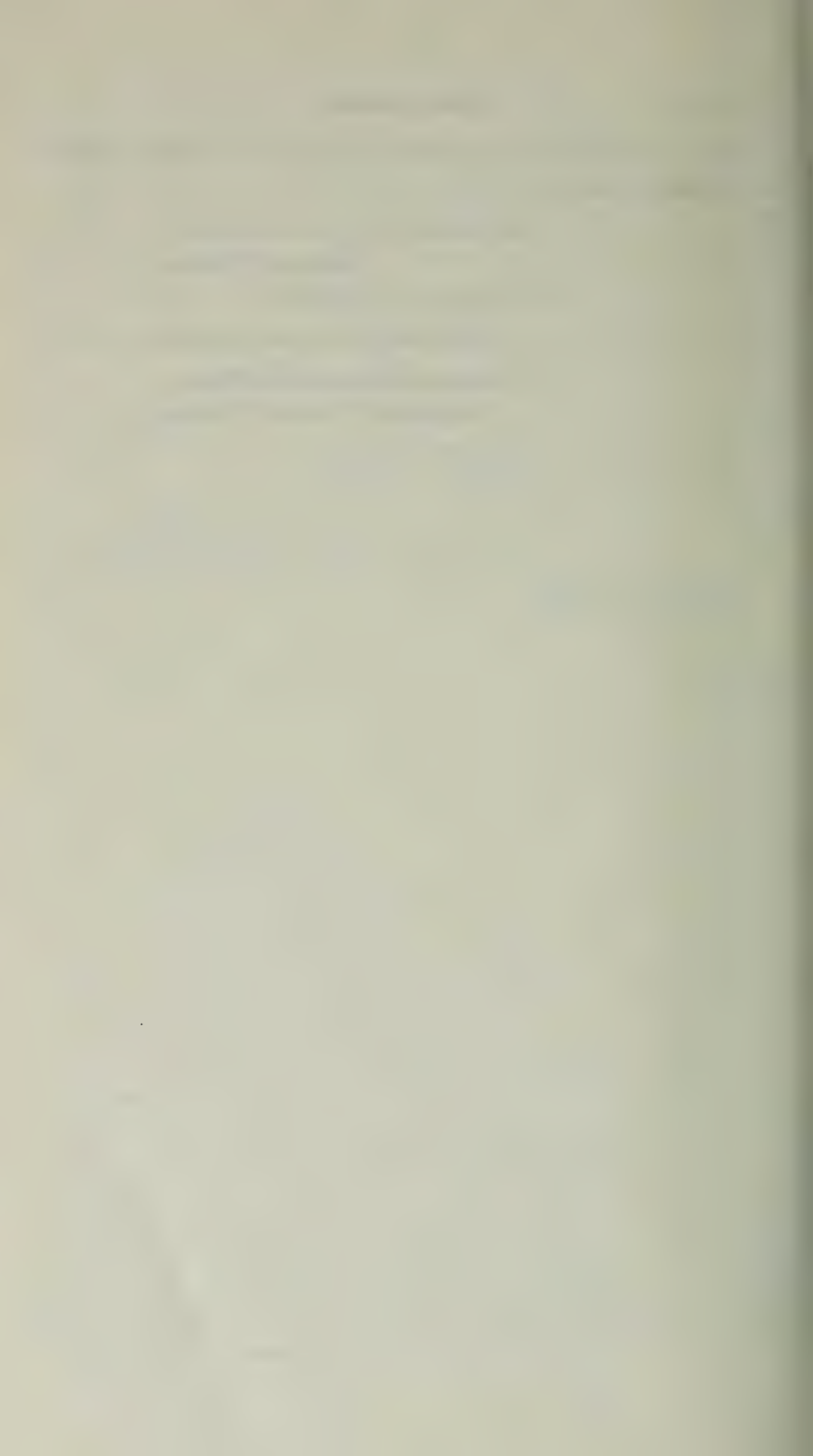
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FEBRUARY 1956.



No. 14840.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SANTA CLARA LEMON ASSOCIATION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

SANTA CLARA LEMON ASSOCIATION,

Respondent.

Petition for Review and Petition for Enforcement of Order
of National Labor Relations Board.

Brief of Petitioner, Santa Clara Lemon Association.

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FILED

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PAUL F. O'BRIEN, CLERK

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Respondent.

Petition for Review and Petition for Enforcement of Order
of National Labor Relations Board.

Brief of Petitioner, Santa Clara Lemon Association.

Preliminary Statement.

A. Jurisdiction.

The matter to which review is sought consists of a Decision and Order dated April 13, 1955 [Tr.¹ 86-90],

¹Transcript of Record.

made by the National Labor Relations Board (hereinafter called the "Board") in a proceeding entitled *Santa Clara Lemon Association* (hereinafter called "Petitioner") and *United Fresh Fruit & Vegetable Workers, LIU No. 78, CIO* (hereinafter called "Fruit & Vegetable Union"), case numbers 21-CA-1851, 21-CA-1907 and 21-CA-1908, holding that petitioner had committed unfair labor practices and had refused to bargain with the said union [Tr. 86-90].

The Petition praying that the Order of the Board be set aside was filed under the provisions of Section 101.14 of the Rules and Regulations of the Board, and under the provisions of Section 10(f) of the Labor-Management Relations Act, 1947, and in compliance with Rule 34 of the Rules of the United States Court of Appeals for the Ninth Circuit, as amended effective January 1, 1949.

The above Act of Congress, approved June 23, 1947, known and designated as the "Labor-Management Relations Act, 1947" (29 U. S. C. A., Sec. 141), provides as follows as to review of this Order:

"Sec. 10(f). Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside." (29 U. S. C. A., Sec. 160(f).)

B. Statement of the Case.

Petitioner is a California cooperative nonprofit association with its principal place of business in Oxnard, California, where it is engaged in processing and packing citrus fruits [Tr. 47].

On November 4, 1953, Petitioner's employees elected said Fruit & Vegetable Union as their bargaining representative [Tr. 6]. On November 13, 1953, the Board certified said Fruit & Vegetable Union as the employees' exclusive bargaining representative [Tr. 7-8].

Bargaining meetings were held between Petitioner and said Fruit & Vegetable Union on December 17, 1953, and January 14, 1954 [Tr. 73-74]. On January 14, 1954, a petition signed by about 70% of the employees and repudiating said Union was served on Petitioner [Tr. 74, 28-29]. Petitioner refused to bargain further [Tr. 279]. Charges were filed by said Fruit & Vegetable Union against Petitioner on November 10, 1953, and on January 28, 1954 alleging discriminatory lay-offs, threats of lay-offs and refusal to bargain with said Union [Tr. 8-12]. Consolidated complaint was issued by the Board on or about May 27, 1954 [Tr. 13-17] and hearing was had before Trial Examiner Wallace E. Royster, in Oxnard, California, from September 13 through September 24, 1955 [Tr. 46].

Petitioner filed written Exceptions to the Trial Examiner's Findings that Petitioner committed unfair labor practices: (1) by refusal to bargain with said Fruit & Vegetable Union, (2) by granting a unilateral wage in-

crease, (3) by refusal to assign Jewell Luttrell to work on the grader, (4) that Petitioner negotiated with the employees committee, (5) that Petitioner threatened its employees because of their union activity and (6) to his recommendation that Petitioner bargain with the United Packinghouse Workers of America, Local 78, CIO (hereinafter referred to as the "Meatpackers Local") [Tr. 85, 81].

The Board affirmed the Rulings and Recommendations of the Trial Examiner and ordered Petitioner to bargain with the said Meatpackers Local [Tr. 86-89].

Petitioner thereafter filed its Petition for Review with the above entitled court [Tr. 95-98].

C. Specifications of Error.

The Board erred in affirming the Findings, Conclusions and Recommendations of the Trial Examiner as follows: (1) that the said Meatpackers Local is the exclusive bargaining representative of Petitioner's employees; (2) that Petitioner committed unfair labor practices by refusal to bargain with the said Meatpackers Local; (3) in recommending that in the future Petitioner bargain with the said Meatpackers Local; (4) that Petitioner discriminated against Jewell Luttrell because of her union activities; (5) that Petitioner threatened employees because of union activities; (6) that Petitioner committed unfair labor practices by making a unilateral wage increase; and (7) that Petitioner engaged in unfair labor practices within the meaning of 8(a)(1), (3) and (5) of the Labor-Management Relations Act [Tr. 79-80].

ARGUMENT.

I.

The Union Is Not the One Elected by the Employees and Is Not a Bargaining Representative of the Employees' "Own Choosing."

Employees have the statutory right "to bargain collectively through representatives of their own choosing." (Sec. 7, Labor-Management Relations Act, 1947, 29 U. S. C. A., Sec. 157.)

The instant point is presented in support of Petitioner's Exceptions to the Board's Findings and Conclusions that Petitioner committed unfair labor practices by refusal to bargain with said Meatpackers Local and its Order that Petitioner:

"Upon request, bargain collectively with United Packinghouse Workers of America, Local 78, CIO, as the exclusive representative of the employees in the appropriate unit described above, and if an understanding is reached embody such understanding in a signed agreement." [Tr.* 89.]

On November 4, 1953, the Board conducted a consent-election [Tr. 6] in the matter of Petitioner and said Fruit and Vegetable Union.

The Fruit and Vegetable Union was certified by the Board on November 13, 1953, as the exclusive bargaining representative [Tr. 7-8].

Bargaining meetings were held between Petitioner and the Fruit and Vegetable Union on December 17, 1953, and January 14, 1954. At the January 14th meeting

*Transcript of Record.

Petitioner's manager was served with an employees' petition repudiating said Fruit and Vegetable Union [Tr. 73-74, 195, 276-278, 28-30]. Petitioner refused to bargain further [Tr. 39, 278, 279]. Unfair labor practice charges were filed by said Fruit and Vegetable Union, and hearing was had in the instant case from September 13 to 24, 1954 in Oxnard, California [Tr. 46].

The Fruit & Vegetable Union, with headquarters in Salinas, California [Tr. 10] had a membership of approximately 18,000 [Tr. 237] with jurisdiction in fruit and vegetable packing houses throughout California and Arizona [Tr. 199]. It was a local industrial union affiliated directly with national CIO [Tr. 199]. Its officers were: Jim Smith, president; Lum Moorehead, vice-president; Helen Parker, secretary-treasurer [Tr. 234]. Its executive board consisted of: Ben Perry, Tex Bell and Herb Cornell [Tr. 234]. Its trustees consisted of: Pop Gandy, Clayton Coon and Dick Brashear [Tr. 234].

Beginning on March 1, 1954, the Fruit & Vegetable Union was operated under an administrator appointed by the national CIO [Tr. 234]. There was some indication of financial difficulties in the Fruit & Vegetable Union [Tr. 236]. The officers and their titles were removed on or about March 1, 1954, by the national CIO [Tr. 30].

On or about July 1, 1954: (1) the Fruit & Vegetable Union's charter and seal were cancelled by national CIO [Tr. 228]; (2) the Fruit & Vegetable Union was amalgamated with the 150,000-member United Packinghouse Workers of America, an international union affiliated with the CIO (hereinafter called the "Meatpackers International") [Tr. 31, 199-200]; (3) the Meatpackers International issued a new charter to said Meatpackers Local [Tr. 228, 229]; (4) the Meatpackers International ap-

pointed its vice-president, Anthony T. Stephens, as administrator in charge of the Meatpackers Local [Carp. **Tr. 113-114]; (5) Mr. Stephens operated the Meatpackers Local from his offices in Chicago, Illinois, where the home offices of the Meatpackers International are located [Carp. **Tr. 114]; (6) the executive board of the Meatpackers International appointed Gilbert Simonson, an international representative of the Meatpackers International, as deputy administrator of the Meatpackers Local [Tr. 230; **Tr. 113, 121]; (7) Deputy Administrator Simonson works under the direction of Administrator Stephens [Carp. **Tr. 117]; (8) Simonson came to the Meatpackers Local at Salinas, California, about July 15, 1954, after the amalgamation was effected [Carp. **Tr. 113, 121]; and (9) Simonson's residence and office are now in Salinas, California, where the principal office of the Meatpackers Local is located [Carp. **Tr. 113-114].

The Meatpackers Local has no officers or executive board, but operates solely under the Administrator and Deputy Administrator from the Meatpackers' International [Carp. **Tr. 118, 119]. Jim Smith, former president of the Fruit & Vegetable Union, was removed from office and is now a business agent in the Phoenix, Arizona area [Tr. 234; Carp. **Tr. 119]. Moorehead, former vice-president of the Fruit & Vegetable Union, was removed from office and is now a business agent in the Brentwood-Tracy, California area [Tr. 234; Carp. **Tr. 119]. Helen Parker, former secretary-treasurer of the Fruit & Vegetable Union, was removed from office and is now employed as a secretary in the Salinas office of the Meatpackers' Local [Tr. 234; Carp. **Tr. 119].

There was admittedly no Board-conducted election by which the employees in the bargaining unit voted to substitute the Meatpackers' Union (local or international) for the Fruit & Vegetable Union. There is not one scintilla of evidence that the employees in the bargaining unit had notice of any new election or held a unit election or took a unit vote on the matter. Nevertheless, the Board finds employee approval, as follows:

"The record in this and four companion cases (112 NLRB Nos. 18, 19, 20 and 21) shows and the Trial Examiner found that after the refusal to bargain, the Union, by a membership vote which included the Respondent's employees, voted to affiliate with United Packinghouse Workers of America, and the name of the Union was changed to United Packinghouse Workers of America, Local 78, CIO. The record also establishes, without contradiction, that a large number of employees in the unit voted; that the vote was unanimous for the affiliation; and that the CIO cancelled the Union's original charter. Pursuant to the authority of the consent election agreement, the Regional Director thereupon amended the certification to substitute the new name of the Union. We find that the Regional Director did not act arbitrarily or capriciously in the circumstances." [Tr. 87, footnote 3.]

The only evidence of employee approval is that there was an area union membership meeting held in Oxnard, California, in March, 1954, to which the membership from the five² citrus packinghouses were invited; that each of

²Santa Clara Lemon Association, Seaboard Lemon Association, Somis Lemon Association, Oxnard Citrus Association and Carpinteria Lemon Association.

the packinghouses was well represented; that there were "about 130, 150 people at the meeting;" and that there was a "unanimous vote for affiliation or amalgamation with the Packinghouse Workers" (*i.e.* said Meatpackers International) [Tr. 201-204]. Each packing house is a separate bargaining unit. The evidence is that no count was taken as to the number of persons present. There is no evidence that minutes were kept of such a meeting [Tr. 203]. The evidence does not show whether there were ten, twenty, a hundred or none at all there from Petitioner. If there were 150 present and the packing houses were equally represented, there would have been 30 employees from each packing house. The evidence indicates that at the meeting none of the bargaining units voted separately as a unit. Actually, therefore, Petitioner or any one of the other four bargaining units might have had, and probable did have, far less than a majority of its eligible voters present to participate in the vote. The total number of eligible voters in the five bargaining units at the time of the November, 1953, Board election was 366:

71—Santa Clara [Tr. 6]

87—Seaboard, Case No. 14824 [Tr. 6]

56—Somis, Case No. 14839 [Tr. 6]

85—Oxnard, Case No. 14838 [Tr. 6]

67—Carpinteria, Case No. 14823 [Tr. 6]

366 total

The Tally of Ballots indicates that of the 71 eligible voters in the Petitioner employing unit, 23 voted against the Fruit & Vegetable Union at the Board-conducted election [Tr. 6].

Employees who were not members of said Fruit & Vegetable Union were probably not present at the meeting

since this was a union "membership" meeting [Tr. 201-202]. There was no "union shop" or other contract between Petitioner and said Fruit & Vegetable Union. A minority group of union members in the bargaining unit could not by their votes at a union membership meeting appoint a union bargaining representative different from the one chosen at a Board-conducted election by a majority of the employees in the bargaining unit.

Moreover, there is substantial evidence that the majority of the employees in the bargaining unit of Petitioner did not desire to be represented by the Fruit & Vegetable Union or by the Meatpackers' Union (International or Local).

On January 14, 1954 Petitioner was served with a petition signed by 50 of the 64 employees, who voted in the Board election [Tr. 6], repudiating the Fruit & Vegetable Union and stating that they wished to be represented by a committee of employees in their own group [Tr. 28-30, 277-279]. Again on August 20, 1954 the employees who signed the petition filed with the National Labor Relations Board a Motion to Intervene in the instant proceeding and an affidavit in support thereof [Tr. 23-32]. In the affidavit the said employees stated that:

"(7) None of the employees represented by the Employees' Committee desire to be represented by Local #78, CIO, or by its parent organization or by any of its affiliates or successors, now or at any time. . . .

"(8) Local #78, CIO, and its affiliates no longer represent a majority of the production and maintenance employees of the Employer."

* * * * *

“(10) . . . that on or about March 1, 1954, all of the managing officers of said Local #78, CIO, were removed from office by order of the CIO National Union and a temporary Administrator placed in charge of said Local #78, CIO.

“By reason of the facts herein alleged and for other necessary and incidental reasons, it would not be for the best interest of any of the employees represented by the said committee to be represented by Local #78, CIO, or its parent organization or any of its affiliates or successors or to members thereof.”

* * * * *

“(12) The Employees' Committee is informed and believes and therefore alleges that the Local #78, CIO, is presently insolvent, defunct, inoperative and unable to carry on its usual business affairs and is attempting to transfer its functions, operations and membership to a meatpackers' international union CIO affiliate . . . It would not be for the best interests of the employees or any of them to be represented by or members of any meatpackers' union because Employer's operations are confined solely to harvesting, washing and packing of fresh perishable citrus fruits, which operation is wholly unrelated to the processing and packing of meat.” [Tr. 25-27.]

The said affidavit also contained the following exhibits:

“EXHIBIT ‘B’

“SAN FRANCISCO EXAMINER

“CIO HEAD TAKES OVER LOCAL UNION

SALINAS, MARCH 3, 1954:—(AP) An administrator from national offices of the Congress of Industrial Organizations has taken charge of Local 78 of the United Fresh Fruit and Vegetable workers and all local office titles have been set aside.

"The administrator, Ken Gillie, sent here by National CIO President Walter P. Reuther, said the union, with a membership of more than 2500, still was solvent and would continue functioning. There had been unconfirmed reports of financial difficulties." [Tr. 30.]

"EXHIBIT 'C'

"LOS ANGELES EXAMINER

Sunday, July 19, 1954

"CIO IN FARM WORK FIELD

15,000-MEMBER LOCAL 78 JOINS BIG, ACTIVE PACK-
ING UNION

By Harry Bernstein

"New life soon may be injected into long-dormant plans to organize agricultural workers into labor unions, it was revealed here yesterday with the announcement of the merger of two Congress of Industrial Organizations unions.

"The small, 15,000-member Fresh Fruit and Vegetable Workers Local Industrial Union 78 has voted to join the 150,000 member Packinghouse Workers, according to John Janosco, Packinghouse field representative here." [Tr. 30-31.]

The said motion to intervene was renewed by Donald A. Pollack, attorney for the said Employees Committee at the hearing [Tr. 110]. Following denial of the motion, Attorney Pollack made an "offer of proof" of the contents of said affidavit [Tr. 110].

The National Labor Relations Board hearing on alleged unfair labor practices of the employer started in Oxnard, California on September 13, 1954 and ended on September 24, 1954 [Tr. 46, 109, 330]. One of the alleged

unfair labor practices was the employer's refusal to bargain with the Fruit & Vegetable Union after January 14, 1954 [Tr. 14]. On September 7, 1954, the Fruit & Vegetable Union, by its last acting officer, and the Meatpackers' Local, acting through Deputy Administrator Simonson, jointly filed with the Board a motion to amend the certification naming the Meatpackers' Local as the exclusive bargaining agent in the place of the Fruit & Vegetable Union [Tr. 33-34]. On September 9, 1954, the Regional Director issued a Notice to Show Cause in writing on or before September 21, 1954 why he should not amend the certification by substituting the Meatpackers' International and the Meatpackers' Local for the Fruit & Vegetable Union [Tr. 35]. On September 14, 1954 the Petitioner filed opposition to the motion and demanded a hearing [Tr. 36]. On September 21, 1954 (in the midst of the hearing in the instant case), and without a hearing, the Regional Director amended the certification naming the Meatpackers' Local as the exclusive bargaining agent in the place of the Fruit & Vegetable Union [Tr. 42-43].

At the beginning of the hearing, on September 13, 1954, the attorney for the General Counsel moved to amend the Complaint, as follows:

"Mr. Cherry: Now, at this time I would like to make a motion to amend the complaint by inserting a paragraph. We could make it Paragraph 5-A, that on or about July 1, 1954, the United Fresh Fruit & Vegetable Workers Union LIU #78, CIO, *was taken over and absorbed* by the United Packinghouse Workers of America, Local 78, CIO, a sister organization.

Trial Examiner: You have stated the amendment?

Mr. Cherry: Yes.

Trial Examiner: All right, go ahead.

Mr. Cherry: The purpose of this amendment is in the event that the Trial Examiner and the Board should find a refusal to bargain did exist at the time of the complaint, any remedial order which would then flow to the unit requiring the responsibility to bargain would be in favor of the *new union*, the United Packinghouse Workers, in the future. However, if there be no finding in the past that they refused to bargain with them except in a continuing proposition, there's no allegation at that time in the complaint. Allegations of the refusal to bargain are much earlier [Tr. 111].

* * * * *

Trial Examiner: Yes, Well, of course, the amendment merely states what the General Counsel states to be a fact, the absorption of LIU #78, CIO, by the Packinghouse Workers. *Now, what flows from that as a legal result? Whether that relieves the employer of any responsibility for bargaining because of such a change is a further and different question.* But I have in mind that you intend the amendment of the complaint to state the alleged facts." [Tr. 112.] (Emphasis added.)

The amendment was granted over the Petitioner's objections [Tr. 112, 113].

The following summary of the pertinent facts and the law clearly illustrates a change of union without the employees' consent: (1) Petitioner consented to a Board election with the Fruit & Vegetable Union on the ballot [Tr. 1-5]; (2) a majority of the employees voted for the Fruit & Vegetable Union on November 4, 1953 [Tr. 6]; and it was duly certified by the Board on

November 13, 1953 [Tr. 7-8]; (3) Petitioner did not consent to an election having the Meatpackers' International or the Meatpackers' Local on the ballot [Tr. 1-5]; (4) the employees did not vote for the Meatpackers' International or the Meatpackers' Local [Tr. 6]; (5) no second election was held after the November 4, 1953 election; (6) the employees in Petitioner's production unit had a basic statutory right to express their choice; (7) their choice was expressed in favor of the Fruit & Vegetable Union but not in favor of the Meatpackers' International or the Meatpackers' Local [Tr. 6]; (8) the Meatpackers' International amalgamated with the Fruit & Vegetable Union, and in the process absorbed the latter [Tr. 111, 30-31, 199-200; Carp. **Tr. 114, 121]; (9) in the amalgamation the charter and seals of the Fruit & Vegetable Union were cancelled, its office titles were set aside, its officers were removed [Tr. 30-31, 234-235; Carp. **Tr. 118, 119, 121]; (10) following the merger the Meatpackers' International was in complete and exclusive control through Administrator Stephens and Deputy Administrator Simonson [Carp. **Tr. 116-119, 121]; (11) the Meatpackers' International chartered, set up and operated through its new Meatpackers' Local, which it maintained in an administratorship status [Tr. 235; Carp. **Tr. 113, 117-119, 121]; (12) the administrator of the Meatpackers' Local is Anthony T. Stephens, a vice-president of the Meatpackers' International [Carp. **Tr. 113]; (13) Mr. Stephens operates from his offices in Chicago, Illinois where the home offices of the Meatpackers' International are located [Carp. **Tr. 114]; (14) the deputy administrator of the Meatpackers' Local is Gilbert Simonson, who is an international representative of the Meatpackers' International [Carp. **Tr. 113];

(15) Simonson's appointment as deputy administrator was made by the executive board of the Meatpackers' International, which is his employer [Carp. **Tr. 121]; (16) Simonson works under the direction of Administrator Stephens [Carp. **Tr. 117]; (17) Simonson's offices and those of the Meatpackers' Local are in Salinas, California [Carp. **Tr. 113-114]; (18) the Meatpackers' International has 150,000 members as compared with 18,000 members in the Fruit & Vegetable Union [Tr. 31, 237]; (19) the Fruit & Vegetable Union had complete control of the union for which the employees voted on November 4, 1953—they have no control of the amalgamated union, either International or Local; (20) the charges in the instant action were filed by the Fruit & Vegetable Union [Tr. 10], and not by the Meatpackers' Union (Local or International).

The employees in the instant case voted to bargain collectively through the Fruit & Vegetable Union [Tr. 6]. They have never voted to bargain through a union whose official representation gives control to an organization other than the Fruit & Vegetable Union. In the instant case, and in the absence of a second election, every detail of administration and control was arbitrarily taken over by the 150,000-member Meatpackers' International from the 18,000-member Fruit & Vegetable Union. The Fruit & Vegetable Union has disappeared as an entity. Deputy Administrator Simonson doesn't even know what offices or officers were in the Fruit & Vegetable Union [Carp. **Tr. 121].

The new Meatpackers' Local controls neither administrative details, nor policy—such matters are under the exclusive control of the Meatpackers' International acting through Administrator Stephens and Deputy Administrator Simonson [Carp. **Tr. 113, 114, 116-117].

The Board-conducted election is the administrative medium through which the employees in the bargaining unit are entitled to exercise their choice. In the instant case there was no second Board election at which the employees in the bargaining unit were permitted to choose whether or not they wanted either a meatpackers' international or a meatpackers' local to act as their bargaining representative. In the absence of the employees' expression of their choice in a second Board-conducted election, they have been denied their basic statutory right "to bargain collectively through representatives of their own choosing." (Sec. 7 of the Labor Management Relations Act, 1947, 29 U. S. C. A., Sec. 157.)

The Regional Director, Twenty-first Region, exceeded the authority of the Act by amending the certification thereby naming as bargaining agent the Meatpackers' International and the Meatpackers' Local, neither of whom had been duly elected by the employees in the bargaining unit. Nothing in the Agreement for Consent Election [Tr. 1-5] can lawfully, nor does, authorize the Board, the Union or Petitioner to substitute a bargaining representative different from the one elected by the employees in the bargaining unit at the Board-conducted election. The National Labor Relation Board has no more authority than the employer to dictate to employees what labor organization shall represent them. (*Aerovok Corp. v. N. L. R. B.*, 211 F. 2d 640, cert. den. 347 U. S. 968.)

In *Dickey v. N. L. R. B.* (C. A. 6, 1955), 217 F. 2d 652, the facts are analogous and the language of the court seems to be clearly applicable to the instant case.

There the Board conducted a consent election. The Blacksmith's International (AFL) was certified by the

Board on February 2, 1953 as the exclusive bargaining representative. Contract negotiations were carried on between the employer and the Blacksmith's Union until July 8, 1953. The Blacksmith's Union filed unfair labor practice charges against the employer.

On July 7, 1953 the Blacksmith's Union (AFL) merged with the Boilermaker's International Union (AFL), which had a much larger membership than the Blacksmith's. On the basis of membership, the Blacksmith's were allotted three out of a total of sixteen vice presidents.

On August 31, 1953, after the unfair labor practices had occurred, motion was filed with the Regional Director of the Board to amend the certification of election by substituting the Boilermaker's for the Blacksmith's. The motion was granted. Appeal was taken to the Board and denied. The Board upheld the Trial Examiner's finding that the situation represented only a change of name, and that under the merger the Blacksmith's did not lose their identity as representatives of the employees.

The Court of Appeals reversed the Board and held that by amending the certification the Regional Director had certified as an exclusive bargaining representative a union which had been in no way concerned with the election. The language of the court is as follows:

“ . . . However, as to the Boilermakers, the order commands the employer to bargain with a union which did not file the charge and on the conceded facts was never chosen by the employees as their exclusive bargaining representative. The court thinks that under these circumstances the employer was under no obligation to bargain with the Boilermakers and that enforcement of this part of the order must be denied.”

* * * * *

“The question is squarely presented whether, by amendment of the certification of representation, the Regional Director is authorized to substitute as exclusive bargaining representative a union different from the one actually chosen by the men and certified. The Regulations of the Board, Series 6, as amended, Section 102.54, authorize the Regional Director to issue a certification of the results of the election and provide that the ‘rulings and determination by the regional director of the results thereof shall be final.’ The Agreement for Consent Election entered into by the employer provides that ‘the determination of the Regional Director shall be final and binding upon any question, including questions as to the eligibility of voters, raised by any party hereto relating in any manner to the election,’ and provides further that ‘rulings or determinations by the Regional Director in respect of any amendment of any certification resulting therefrom shall also be final.’ It is clear from this context that under the Regulations the authority of the Regional Director to amend a certification must relate to the election. But here the Regional Director certified as exclusive bargaining representative a union which had been in no way concerned with the election.”

* * * * *

“. . . An employer cannot by dealing with a union constitute it the lawful representative of employees who have not chosen it to represent them. The history of the decisions of the Supreme Court of the United States as to company unions demonstrates this fact. Nor can the identity of the union agent who is negotiating with the employer decide which union is the exclusive bargaining agent of the men. The vote of the employees is the decisive factor in securing ‘that freedom of choice which is

the essence of collective bargaining.' International Ass'n of Machinists, etc. v. N. L. R. B., 311 U. S. 72, 79, 61 S. Ct. 83, 88, 85 L. Ed. 50.

"Section 7 of the Labor Management Relations Act, 1947, 29 U. S. C. A. §157, provides that 'Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing * * *.' This is the basic provision of the Labor Management Relations Act. Here the men voted for the Blacksmiths and the result was duly certified. They did not vote for the Boilermakers. No second election was held after that certified February 2, 1953. The fact that the union representative said he told the employees that merger proceedings were pending is immaterial. The employees had a basic statutory right to express their choice. It was expressed in favor of the Blacksmiths but not in favor of the Boilermakers.

"Here it is conceded that another and different organization amalgamated with the Blacksmiths. In the merger the officers were divided between the constituent organization proportionately according to membership. While the numbers are not given, many more individuals were members of the Boilermakers and Ship Builders than of the Blacksmiths, for when the offices were divided upon a basis proportional to membership three out of sixteen vice presidents were allotted to the Blacksmiths. (Boilermakers-Blacksmiths Journal, *supra*.)

"The Blacksmiths were a fraction only, although a substantial fraction, of the resulting membership of the Boilermakers.

"Moreover, the official management of the new union was not confided to the Blacksmiths. They

had only three vice presidents. The president and the secretary-treasurer and thirteen vice presidents were originally members of the Boilermakers. The Blacksmiths had complete control of the union which the employees joined. They had no control of the amalgamated union.

* * * * *

“Here the facts are undisputed and the law is plain. The men voted to bargain collectively through the Blacksmiths. They have never voted to bargain through a union the majority of whose members did not belong to the Blacksmiths, and whose official representation gives control to another organization than the Blacksmiths. The amendment of the certification of election by the Regional Director was unauthorized and the Board could not validate it by its approval.”

The controlling facts in the instant case are substantially similar to the facts of the *Dickey* case. In substance in the instant case we now have single-handed operation of the Meatpackers' Local by the Meatpackers' International through the latter's officers whom it has appointed administrator and deputy administrator of the Meatpackers' Local. All officers of the Fruit & Vegetable Union have been removed from office, its charter and seals have been cancelled, and in the amalgamation this union has completely disappeared as an entity.

As further evidence that all of the officers of the Fruit & Vegetable Union had been removed, deputy administrator Simonson testified that he was appointed after the Meatpackers' International had taken over, and that he did not know what offices or officers had been in the Fruit & Vegetable Union [Carp. **Tr. 121].

It is well established that when the union ceases to exist as the same legal entity, its authority as bargaining representative is terminated. (*N. L. R. B. v. National Shirt Shops* (C. A. 5, 1954), 212 F. 2d 491; *N. L. R. B. v. West Ohio Gas Co.* (C. A. 6, 1949), 172 F. 2d 685; *N. L. R. B. v. Acme Air Appliance Co.* (C. A. 2, 1941), 117 F. 2d 417; *N. L. R. B. v. Youngstown Mines Corp.* (C. A. 8, 1941), 123 F. 2d 178.)

In re Foote Bros. Gear & Mach. Corp. (1939), 14 NLRB 1045, the Board held that where there was a shift in national affiliation, under circumstances which indicated that the old union ceased to exist as the same entity, its authority as bargaining representative was terminated.

In the instant case the record does not show how many of Petitioner's employees, if any, were members of the Meatpackers' Union (Local or International) after revocation of the charter of the Fruit & Vegetable Union. There is no showing in the instant case that a majority, or any, of Petitioner's employees were members of the Meatpackers' Union (International or Local) after receipt of its charter. The record does show that approximately 52 [Tr. 29-30] of Petitioner's 71 eligible voters [Tr. 6] indicated that they did not wish to be members of the Meatpackers' Union (Local or International) [Tr. 27]. Such facts indicate that the Meatpackers' Union (International or Local) was never designated by Petitioner's employees as their bargaining representative. Therefore Petitioner was under no duty to recognize or bargain with the Meatpackers' Union (Local or International).

However, in *Carson Pirie, Scott & Co.* (1946), 69 NLRB 935, the Board held that a local union's change of national affiliation from CIO to AFL was a sufficient change of circumstances to warrant a new election within

one year. In the *Carson Pirie* case, Local 291, CIO was certified on October 23, 1945. On January 25, 1946, Local 291, AFL petitioned for an election, which was granted. The new AFL local retained its former name, its number, its executive board, and its local officers, but obtained a new charter from AFL. In granting the petition for an election the Board said (at p. 938):

“Here the effect of the employees’ action in voting to disaffiliate with Local 291, CIO, and form Local 291, AFL, was to change the very character of their bargaining representative and to raise a doubt as to the actual identity of the Union certified by the Board on October 23, 1945.

* * * * *

“. . . the unresolved doubt as to the identity of the bargaining representative serves to retard the stability in labor relations which it is the primary policy of the Act to promote. Accordingly, we find that the Board’s certification of October 23, 1945, cannot operate to bar a present determination of representatives.”

In *Wagner Electric Corp.* (1950), 91 NLRB 220, the Board denied a Motion to Amend Certification by substituting the name of the moving union for that of the certified union, and held that questions concerning representation must be resolved by petition and secret ballot.

In *Columbian Rope Co.* (1950), 88 NLRB 1448, where substantial doubt was created as to identity of employees’ representative by union’s merger and subsequent transfer of affiliations, the Board denied the request to amend the certification and directed an election to resolve the doubt.

Under the facts heretofore stated it is clear that the Meatpackers union (International or Local) was not the union elected by Petitioner's employees and that Petitioner therefore committed no unfair labor practices by its refusal to bargain with said Meatpackers' Union. It is further apparent that Petitioner cannot be compelled to bargain with the Meatpackers' Union (Local or International) in the future in the absence of a Board-conducted election whereby a majority of the employees vote by secret ballot to elect the Meatpackers' Union as their bargaining representative.

For the reasons heretofore stated the Board's Order that Petitioner bargain collectively with the Meatpackers' Local Union is contrary to law and in violation of the rights of the employees, and the Board's finding that Petitioner failed and refused, contrary to the Act, to bargain with the Meatpacker's Local Union should be reversed.

II.

Granting the Unilateral, General Wage Increase Did Not Constitute an Unfair Labor Practice.

It was stipulated that general wage increases were made in January 27, 1954 and on April 24, 1954 [Tr. 207-208]. Petitioner admits that it did not consult any Union about either of the wage increases [Tr. 300].

It is not disputed that bargaining sessions were between the Fruit & Vegetable Union and Petitioner on December 17, 1953 and January 14, 1954 [Tr. 195]. It is also undisputed that there were no meetings between any Union and Petitioner after the employees' petition [Tr. 28] was served on Petitioner on January 14, 1954 [Tr. 197-198]. The reasons why there were no further bar-

gaining meetings have been discussed at length in the preceding section of this brief.

Petitioner stood between the demands of the Fruit & Vegetable Union on one side and the demands of a majority of its employees on the other [Tr. 300-301]. Wage adjustments were made to meet the competition of other packing houses [Tr. 294]. The new wage rates of \$1.15 for women and \$1.40 for men were ascertained by checking with other packing houses to determine what they were paying [Tr. 292-293]. The wage increases were made retroactive to September 28 because that was the time when the competitive packing houses had raised wages [Tr. 301].

The Trial Examiner considers that "the reason for making the wage increase in the circumstances outlined to be immaterial" [Tr. 75]. The Board has not been so arbitrary. It has held that unilateral wage increases may be made when bargaining negotiations were in suspension.

In regard to the effect of a "suspension" of negotiations, the Board declared:

"In these circumstances the respondent was under no duty to withhold normal action respecting wages pending consultation with the Union." (*Montgomery Ward & Co.*, 39 NLRB 229; *Westchester Newspapers, Inc.*, 26 NLRB 630.)

In the instant case we have negotiations suspended as a result of the conflicting demands of the Fruit & Vegetable Union on one side and of a majority of the employees and unusual circumstances on the other. How soon the difficulty would be resolved by the Board, or by a Court, or both, could not be foreseen. It might take a month, a year, or even two or three years. In the meantime the employees

would be deprived of a wage adjustment to which they were admittedly entitled because of the July, 1953, major change in operations—this matter had been under study since July, 1953 [Tr. 299]. Petitioner's labor supply would have been jeopardized by its inability to meet competitive wage rates. Should both Petitioner and the employees be penalized by a frozen wage scale throughout the period necessary to resolve the legal conflict?

Petitioner did the only thing that it could reasonably do under the circumstances. It made unilateral wage increases [Tr. 294].

III.

Refusal to Assign Luttrell to Work in the Packing Section Was Not an Unfair Labor Practice.

The Complaint charges that from on or about September 9, 1953, to the present Petitioner has discriminated against Jewell Luttrell by temporary lay-offs [Tr. 15, par. 7].

The discriminatory lay-offs charged are based on the fact that Luttrell was sent home when the washer was not operating rather than being assigned to grading fruit, in the packing side of the shed. Luttrell's testimony negatives such a contention. She admits that she was not a packer [Tr. 151]. She testified that the operation slows down from September until January [Tr. 154], and that the rush period is from March until June [Tr. 149]; that she was called to work whenever the washer was running [Tr. 162]; that she got overtime during the rush periods [Tr. 149, 154-155]; that in July, 1953, the new volume-fill operation was installed which eliminated all piece work and reduced the girls' washer crew from 34-36 to about 20 [Tr. 120-122, 160-162]; that when this

change-over occurred she was assigned to a new job by herself on the washer in July, 1953 [Tr. 120]; that prior to the change-over in July, 1953, she had worked in the packing section when the washer wasn't operating [Tr. 122], and since the change-over in July, 1953, she did grading in the packing section only one day which was September 16, 1953 [Tr. 152, 153]; that when the previous foreman quit in June, 1953, she was put on the washer picking culls [Tr. 152], and the biggest part of her work had been on the washer [Tr. 151]; that at one time she was assigned to picking culls because, by her own admission, there wasn't any other worker at the time who knew how to pick them out [Tr. 150]; that she did the above described work on the washer until February 15, 1954, when she was assigned to the pre-sort belt where she worked with three other girls, all of whom had been employed at Petitioner for quite a while [Tr. 162-163]; and that her union activity at Petitioner did not begin until August 11, 1953 [Tr. 156-159].

The complaining witness's own testimony indicates that the July, 1953, change in operations was the cause of the change in her job assignment, all of which occurred prior to any union activity which started in August, 1953. General Counsel's witness Venegas, testified that she had been regularly employed by Petitioner as a grader since April, 1953, and that Luttrell had not worked in the grading section at any time since April, 1953 [Tr. 179-182]. The grader foreman testified that Luttrell had not worked in the grading section after March, 1953 [Tr. 209], because he had told the house foreman that he did not want her in the grading section [Tr. 210].

It should be noted here that on September 16, 1953, the only day that Luttrell claims to have worked on the

grader since July, 1953 [Tr. 152-153], the grader foreman who did not want her in the grading section, was away on vacation [Tr. 211-212]. Even giving full credit to Luttrell's testimony, the mere fact that someone temporarily in charge of the grading section used her for a day, does not reverse Petitioner's policy and practice (and of the grading foreman, in particular) since March, 1953, of not using her in the grading section at any time.

The washer foreman, Lockner, testified that the last time he saw Luttrell grading in the packing section was in March, 1953 [Tr. 306-307]. The testimony of General Counsel's rebuttal witnesses, Lievsay [Tr. 313-314] and Solano [Tr. 317], who testified that they saw Luttrell working in the grading section in the middle of September, 1953, was in conflict with the testimony of his own witnesses Luttrell and Venegas mentioned above. Solano testified that she personally had not worked at Petitioner after Labor Day, 1953, or possibly a week before that [Tr. 318].

Luttrell admitted that the house foreman told her that one of the reasons that she would not be sent to grade in the packing section was that some of the women did not want her there [Tr. 128-129]. This is confirmed by the testimony of the house foreman, Sayre [Tr. 255-256, 218-219], and by the testimony of the grader foreman, Barnes [Tr. 210].

All of the above evidence, including the testimony of Luttrell, is contrary to the Trial Examiner's finding that:

"after September 14, 1953 . . . Respondent, through Sayre, followed a policy of refusing to permit her to work on the grader at such times that the washer was shut down; *that this practice was a reversal of that which had been observed prior to the*

time when the Respondent became aware of Luttrell's Union interest; and that it was a discriminatory retaliation against her because of her leadership in the organizing campaign." (Emphasis added.) [Tr. 71-72.]

There is no evidence of "reversal" of policy or practice after April, 1953, or, at the latest, July, 1953. The mere accident that under a very temporary grading foreman Luttrell may possibly have worked in the grading section one day in September, 1953, does not establish that there was any policy or practice of using her in grading after April or July, 1953.

The changes made in Luttrell's work occurred in July, 1953, and the reasons therefor were explained to her. In fact there is substantial evidence, including the testimony of General Counsel's own witness, that Luttrell did no work in the packing section after April, 1953. Petitioner's house foreman, Sayre, did not know about any union activity at Petitioner until the latter part of October, 1953 [Tr. 263]. Fuller, the manager, did not observe evidence of union activity at Petitioner prior to October, 1953 [Tr. 282], and on about September 15, 1953, he received a letter from the Fruit & Vegetable Union [Tr. 281]. The house foreman, Sayre, did not know until shortly before or shortly after the plant election (November 4, 1953) that Luttrell was active in the Fruit & Vegetable Union [Tr. 260]. There is no evidence that the manager, Fuller, had any knowledge of Luttrell's Union activities prior to the receipt of the Union letter of November 6, 1953 [Tr. 37], naming her as shop steward [Tr. 268].

The evidence indicates that the change of job assignment of which Luttrell complains, namely, using her only on the washer, occurred long before there was any Union

activity at Petitioner and long before Petitioner's management had any knowledge of her Union activities. She was kept out of the packing section after March, 1953, on order of the packing foreman, and in July, 1953, she was told why she could not return to work in the packing section. Neither Petitioner's manager nor its house foreman had any knowledge of Luttrell's Union activities prior to October, 1953, and they did not know until November, 1953, that she was a shop steward. Using the evidence most favorable to the General Counsel, namely, that the last time she worked in the packing section was one day in September [when the packing foreman was on vacation—Tr. 211] but not later than September 16, 1953, that is still prior to the time that Petitioner's management had any knowledge of her Union activities, and is two months before Petitioner knew that she was a shop steward.

The Act does not purport to affect the normal right of the employer to select, lay off, or discharge his employees. He has the right to exercise his judgment as to which employees should best be retained or recalled. Whether or not the employer in the exercise of his managerial judgment is just or unjust, wise or unwise, is not a matter of concern, and the Board's inquiry must be confined to the question as to whether or not the employees have been discriminated against because of their Union activities or affiliations. (*N. L. R. B. v. American Pearl Button Co.* (C. A. 8), 149 F. 2d 258.) In the absence of any knowledge by employer of employee's Union membership, discriminatory motivation for lay-off is not established. (*Minnesota Mining & Mfg. Co.*, 81 NLRB 557.) Even though employer knew of employee's Union membership, a lay-off is not discrimina-

tory where small amount of Union activity engaged in by an employee was unknown to the employer. (*Jenks*, 81 NLRB 707.) Where the lay-off is made for business reasons and resulted from change of job assignment which occurred prior to Petitioner's knowledge of the employee's Union activities, such lay-off is not discriminatory. (*N. L. R. B. v. Alco Feed Mills* (C. A. 5), 133 F. 2d 419.)

Luttrell admits that she worked whenever the washer was operating, and that she received considerable overtime. Since her job assignment to the washer alone occurred long prior to Petitioner's knowledge of Union activity in the plant, and of her Union activity in particular, none of the lay-offs in connection with her work on the washer can be said to be discriminatory.

The General Counsel contends that Luttrell's temporary lay-offs were because of her Union activities. Petitioner contends that her lay-offs were because of her change in job assignment which occurred long before there was any known Union activity either by Luttrell or other employees.

In *Bussman Mfg. Company v. N. L. R. B.* (C. A. 8, 1940), 111 F. 2d 783, where the General Counsel contended that a man was discharged for union activity and the employer contended that the man was discharged because of refusal to work, the court said:

"When the testimony shows, as it does here, that the cause of the discharge may have been one of two things, one of which was illegal and the other legal, the fact finding tribunal cannot guess between the two causes and find that union activities were the real cause when there is no satisfactory foundation in the testimony to support the conclusion.

Patton v. Texas & Pacific Railway Company, 179 U. S. 658, 663, 21 S. Ct. 275, 45 L. Ed. 361. When evidence is consistent with either of two inconsistent hypotheses it establishes neither. *Stevens v. The White City*, 285 U. S. 195, 204, 52 S. Ct. 347, 76 L. Ed. 699; *New York C. R. Company v. Ambrose*, 280 U. S. 486, 490, 50 S. Ct. 198, 74 L. Ed. 562. Under these circumstances, had the case been tried by a jury, it would have been the duty of a trial judge to direct a verdict for the defendant. *Chicago M. & St. Paul Ry. Company, v. Coogan*, 271 U. S. 472, 478, 46 S. Ct. 564, 70 L. Ed. 1041; *Massachusetts Protective Association v. Moubert*, 8 Cir., 100 F. 2d 203, 206.”

The National Labor Relations Act is not intended to empower the Board to substitute its judgment for that of the employer in the conduct of its business. (*N. L. R. B. v. Union Pacific States* (C. A. 9, 1938), 99 F. 2d 153), quoted with approval in *Martel Mills Corp. v. N. L. R. B.* (C. A. 4, 1940), 114 F. 2d 624), or to interfere with the employer’s right to conduct its own business. (*N. L. R. B. v. Cape County Mill Co.* (C. A. 8, 1944), 140 F. 2d 543.) The Act does not vest in the Board managerial authority. (*N. L. R. B. v. Union Pacific States, supra*); *Pennsylvania Labor Relations Board v. Kaufman Department Store* (1942), 345 Pa. 398, 29 A. 2d 90.)

In *Union Drawn Steel Co. v. N. L. R. B.* (C. A. 3, 1940), 109 F. 2d 587, the Court said:

“The right of the employer, for general economic reasons, to make use of a smaller staff to operate his business, to decrease his production, or to go out of business entirely if he desires to do so, we regard as indubitable. For example, if an employer

has employed ten men to operate ten machines, he may, for such reasons employ only nine men to operate the ten machines or he may operate only nine machines with only nine men, or, if he chooses, he may cease all operations. This right must be deemed to be one of the employer's weapons in the general economic struggle."

The evidence in support of a finding must be substantial, and surmise or suspicion is not enough. (*N. L. R. B. v. Williamson-Dickie Mfg. Co.*, 130 F. 2d 260.) The test for substantial evidence is not satisfied by evidence which gives equal support to inconsistent inferences. (*Appalachian Electric Power Co. v. N. L. R. B.*, 93 F. 2d 986; *Bussman Mfg. Co. v. N. L. R. B.*, 111 F. 2d 783.) Since there is no substantial evidence to support the allegations of discriminatory lay-offs as against Luttrell, the findings must be for Petitioner (*N. L. R. B. v. Norfolk Shipbuilding*, 109 F. 2d 128; *Jefferson Electric v. N. L. R. B.*, 102 F. 2d 949).

For the foregoing reasons the Board's findings that there were discriminatory lay-offs as to Luttrell are not supported by substantial evidence and should be reversed.

IV.

Threatening Statements.

It is alleged that Roger Sayre, the packinghouse foreman, made certain specific threatening and coercive statements to employees on November 2 and 6, 1953 [Tr. 16]. In the absence of allegations therefor, evidence of other threatening and coercive statements by Sayre or others on the alleged dates, or at other times, would be wholly irrelevant and immaterial to any of the issues in this proceeding.

There is a denial of due process of law when the issues are not clearly defined and the employer is not fully advised of them. (*Consolidated Edison, Etc. v. N. L. R. B.*, 305 U. S. 197.) The Board has recognized the necessity of specific charges in its Statements of Procedure, Section 101.8 (1 Commerce Clearing House Labor Law Reporter (4th Ed.), Sec. 1110.08, p. 1145).

General Counsel's witnesses attribute numerous statements to Sayre about Union matters. Most of them differ entirely and completely from the content or substance of the threats or coercive statements specifically alleged. The evidence as to when any particular statement was made is, with few exceptions, very vague and indefinite.

The numerous statements attributed to Sayre, Fuller and others were on their face—both by date and content—wholly immaterial and irrelevant to the charges alleged in the Consolidated Complaint [Tr. 16]. The only threatening statement attributed to Sayre on November 6, 1953 is said by the Trial Examiner to have been made sometime in October [Tr. 52-53]. Not one statement of Sayre or Fuller, as summarized by the Trial Examiner, occurred on November 2 or 6, 1953, or on any dates close to that. It is very doubtful whether any of the statements summarized by the Trial Examiner, or which appear elsewhere in the record, contains in substance or effect any of the specific threats or coercive statements alleged in the Complaint. Several conversations were recalled by Sayre, but discussions as to Union matters or threats because of Union activity were denied in their entirety. In fact, the evidence is that after on or about September 15, 1953 the entire management was under orders not to discuss Union matters with employees [Tr. 271, 40, 285, 303, 259].

Where there are conflicting versions of supervisor's statements, and the speaker's vagueness makes statements susceptible of multiple interpretations, and not all of them coercive, the Board has refused to isolate one version of the testimony in order to support a finding of violation of the Act. (*U. S. Gypsum Co.*, 93 NLRB 966.) Statements that the employer "didn't want" the Union at the plant and that "nobody could make them pay more than 53¢ an hour" were held too obscure to warrant a finding that they were coercive. (*Goodall Co.*, 86 NLRB 814.) In the absence of statement clearly threatening or coercive, remarks or queries by employers to employees come within the protection of free speech guaranteed by the First Amendment to the Constitution. (*N. L. R. B. v. Virginia Power Company*, 314 U. S. 469, 86 L. Ed. 348; *Thomas v. Collins*, 323 U. S. 516, 89 L. Ed. 430; *Sax v. N. L. R. B.* (C. A. 5), 171 F. 2d 793, 794.) An employer has the right to express his views concerning the advantages and disadvantages of the Union. (*N. L. R. B. v. Nylan-Sparta Company* (C. A. 6), 166 F. 2d 485.) Casual conversations with employees regarding Union matters generally do not constitute unfair questioning or interference by the employer. (*Cleveland Graphite Bronze Company*, 75 NLRB 61.)

For the foregoing reasons the Board's findings as to threatening statements by Sayre should be reversed.

Respectfully submitted,

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No. 14840

**In the United States Court of Appeals
for the Ninth Circuit**

SANTA CLARA LEMON ASSOCIATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

**ON PETITION FOR REVIEW AND REQUEST FOR ENFORCEMENT
OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD**

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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In the United States Court of Appeals for the Ninth Circuit

No. 14840

SANTA CLARA LEMON ASSOCIATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

*ON PETITION FOR REVIEW AND REQUEST FOR ENFORCEMENT
OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD*

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of Santa Clara Lemon Association to review and set aside an order of the National Labor Relations Board (R. 88-90)¹ issued against petitioner on April 13, 1955, following the usual proceedings under Section 10 (c) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Sec. 151, *et seq.*), hereafter called the Act. In its answer (R. 101-106) the Board has requested enforcement of its order. This Court has jurisdiction of the proceeding pursuant to Section 10 (e) and (f) of the Act, the unfair

¹ References to portions of the printed record are designated "R". Wherever in a series of references a semicolon appears, references preceding the semicolon are to the Board's findings; succeeding references are to the supporting evidence.

labor practices having occurred at petitioner's plant in Oxnard, California, within this judicial circuit. The Board's decision and order are reported in 112 N. L. R. B. No. 17.

COUNTERSTATEMENT OF THE CASE

I. Preliminary statement

This is one of five cases (Nos. 14823, 14824, 14838 and 14839 in addition to the instant case) before the Court involving a group of independent nonprofit cooperatives engaged in the processing and packing of citrus fruit in Southern California,² and their relations with the Union³ which represented the employees of each. In view of the similarity in background events of all five cases, a summary initial statement thereof, followed by a more detailed treatment in each brief of the facts of the particular case, will serve to acquaint the Court with the relation between the cases and the questions they present.⁴

In November, 1953, following a campaign by the Union to solicit members and support among petitioners' employees, separate consent election agreements were entered into, and representation elections were conducted at petitioners' plants, each constituting a separate bargaining unit. In each instance a

² Petitioner, herein sometimes referred to as Santa Clara, operates a packing plant in Oxnard, California, from which it ships a substantial amount of citrus fruit into interstate commerce (R. 47; 128). No jurisdictional issue is presented.

³ United Fresh Fruit & Vegetable Workers Union, L. I. U. No. 78, CIO, herein called the Union.

⁴ The five cases were not consolidated before the Board; separate hearings, intermediate reports and decisions and orders were held and issued with respect to each.

majority of the employees voted for the Union, and, pursuant to the various consent election agreements, the Board's Regional Director certified the Union as representative of the employees at each of the five packing houses. Thereafter, separate negotiations were initiated between petitioners and the Union for the purpose of concluding bargaining agreements. On the Union's side, all negotiations were attended by the same bargaining committee consisting of a group of employees from the various packing houses and certain of the Union's officers who were not employed by petitioners; on petitioners' side, negotiations were carried on by representatives of the particular packing house involved together with the same counsel who represented all five petitioners. Before agreements had been reached between the Union and any of petitioners, and within a few months after the Union had been certified, a majority of the employees at each packing house signed separate documents by which they notified their respective employers, upon separate occasions, that they no longer wished to be represented by the Union. As a result, three of the petitioners broke off negotiations with the Union; negotiations at the other two packing houses had already been broken off by the respective employers on the alleged ground that impasses in bargaining had been reached. No further bargaining occurred at any of the packing houses. Shortly after negotiations had been terminated, however, each petitioner separately increased wages without either notifying or discussing the matter with the Union.

The Board found in all five cases that petitioners had violated Sections 8 (a) (5) and (1) of the Act by breaking off negotiations and refusing further to deal with the Union, and by their unilateral action with respect to wages. The Board's remedial orders require that the employers fulfill their bargaining obligations under the Act and bargain with the Union. Since, in the summer of 1954, following the events in these cases, the Union, which theretofore had been directly chartered by the CIO, affiliated with the Packinghouse Workers of America, CIO, the Board's bargaining orders describe the Union by its present name, Local 78, United Packinghouse Workers of America, C. I. O., rather than as United Fresh Fruit and Vegetable Workers Union, L. I. U., No. 78, C. I. O., the name it held at the time it was certified as representative of petitioners' employees.

Because of variations in factual details and to some extent in the legal questions in each case, a separate brief is filed for each of these cases. Insofar as questions of law are presented which are common to all five cases, however, we discuss them in this brief. Thus, we treat herein, pp. 25-37, the correctness of the Board's finding that all petitioners violated the Act by unilaterally granting wage increases following their termination of negotiations with the Union, and the propriety of its order requiring petitioners to bargain with the Union as now affiliated. In addition, we also show in the brief in this case the correctness of the Board's finding that Santa Clara committed other violations of the Act in opposing the Union's organi-

zational drive by means of threats and promises, and by discriminating against an employee in making work assignments because of her activity in behalf of the Union. The evidentiary facts upon which all of these findings in the instant case are based may be summarized as follows:

II. The Board's findings of fact

A. Santa Clara's opposition to the Union during the organization of its employees and following the Union's certification as their representative

In the fall of 1953 the Union began an organizational drive among the employees of citrus fruit packing houses in Southern California, including Santa Clara's plant. Soon after the drive began, early in September, Santa Clara's foreman Roger Sayre told employee Jewel Luttrell that he knew of a Union meeting to be held that night, and, adding that "I'd like to find out more about that meeting," suggested that Luttrell and some of the other employees attend (R. 65; 115, 117). He further told Luttrell that if she should attend the meeting and obtain membership cards, "I wouldn't fire you" (R. 65; 118). The following morning, Sayre asked Luttrell whether she had attended the Union meeting, and upon being given a negative answer, commented "Well, I'd sure like to find out what was going on at that meeting so that I could tell [plant manager] Fuller when he gets back what's going on" (R. 65; 133).

In the middle of September, when the organizational drive gained momentum, the Union petitioned the Board to hold an election to determine whether the employees wished to be represented by it. About

this time, Sayre told Luttrell that the Union supporters who were distributing membership cards among the employees were making misrepresentations "and making * * * a lot of promises that they know they are not going to get" (R. 65; 134). Shortly thereafter he also told Luttrell that even if the Union should win the majority support of the employees, "the company is not going to sign a contract" (R. 65-66; 129). He added that if the employees weren't "involved in this union [they would] be making \$1.15 an hour" (*ibid*). Again, just before the election, which was set for November 4, 1953, Sayre, in response to the request of employee Ruby Carter that she be given more work, stated that "there's going to be a vote here in a few days and * * * if I know the ones who vote for the house, I'm going to try to keep them on but if I know the ones who vote for the union, so help me, I'm going to lay them off" (R. 67; 172). Sayre issued a similar threat to another employee, William Turnage, when he observed the latter wearing a union button, stating: "Well, if the union goes in, you know I will have to lay you off because I will have to get an experienced man" (R. 68-69; 178, 183).

On November 4, 1953, a majority of Santa Clara's employees voted for the Union as their bargaining representative at an election conducted by the Board's regional director pursuant to a consent election agreement entered into by the parties, and on November 13, the Union was certified as such representative in

accordance with the consent election agreement and the Act (R. 73; 6-8). Sayre continued to oppose the Union, however, and thanked the employees who "stood by him during the election and [stated] that everything would work out O. K. for them," observing at the same time that he was going to "lay off 30 girls that day" (R. 70; 315). Sayre also told employee Guillen, who had actively opposed the Union before the election, that he knew what Guillen was doing, asked him to "keep on", and assured him that "whatever [he did] the company will back [him]up" (R. 69; 319). In succeeding weeks employee Guillen, with Sayre's permission, spent a substantial part of the working day, for which he was paid, talking with employees throughout the plant in order to dissuade them from supporting the Union (R. 69; 319-320).

In January, 1954, after contract negotiations between the Union and Santa Clara had begun (*infra*, p. 11), a petition purporting to repudiate the Union as a bargaining representative was circularized among the employees. Sayre inquired of employee Ruby Hooper whether she had signed the petition, and told her that it "was all right for [her] to go ahead and sign the petition" (R. 58; 165). Thereafter, Sayre told Hooper that he would "like very much for [her] to help out with the committee [which sponsored the petition]," and, indeed, that she had better "get [her] name in black and white * * * [on the petition] for Mr. Fuller and me to show the growers" who cooperatively owned Santa Clara (R. 57-58,

68; 169). In like vein Sayre asked employee Andres Reyes, whether he had signed the petition, and upon receiving a negative answer stated: "If I were you, I would have already signed that petition" (R. 69-70; 189). And finally, Sayre told another employee, Joe Gomez, that he "knew who signed that petition and who didn't" and that "those who didn't sign the petition are going to get financially hurt" (R. 69; 183). He added that a promotion to foreman, which he previously had held out as a strong possibility for Gomez, was "out * * * because of political reasons" (R. 69; 186).

B. Santa Clara's discrimination in making work assignments to employee Luttrell because of her union activity

Jewel Luttrell was among the original employees hired by Santa Clara when its plant first opened in 1949, and she remained with Santa Clara continuously thereafter with the exception of a few months when she worked for another packing house (R. 48; 311, 118-120). She had had 14 years experience in working in citrus packing operations, and held a variety of positions with Santa Clara, including that of assistant to the washer foreman and grading jobs which required skill and experience (R. 48; 309-310, 118-120)). Sayre told Luttrell in May 1953, before any union activity had begun, that she "would never have nothing to worry about, * * * [that she] would always have a job because [she] had been there that long, [and that he] liked to have [her] because he could transfer [her] around to different places to work" (R.

48-49, 65; 125). Moreover, it was customary for Luttrell, along with other employees, to be assigned to work in the packing section whenever the washer, where she was ordinarily employed, was not in operation (R. 48, 71-72; 122-123, 152-153).

Luttrell was one of the first employees active in the Union's drive to gain representation rights at Santa Clara. She attended a Union meeting in August 1953, and obtained membership cards which she distributed among the employees (R. 49, 65; 116, 156-158). Thereafter she held several Union meetings at her home, and continued to solicit new members (R. 49, 65; 116-117, 158).

As stated *supra*, pp. 5-6, Sayre singled out Luttrell to discuss with her the Union's organizing drive as soon as it began. Luttrell wore a Union button while at work, and openly solicited members in the plant during rest periods and other nonworking hours (R. 65, 117, 136, 267). In the middle of September, when Sayre was asserting his opposition to the Union, he told Luttrell that he knew "that these [membership] cards are in this plant and who brought them in here" (R. 65; 134). At about the same time, Sayre ended his established practice of assigning Luttrell to the packing section when the washer, where she normally worked, shut down, restricting her to the washer and thereby reducing the number of hours she would otherwise have worked (R. 71-72; 122-124, 152, 153). Luttrell asked Sayre why she was being discriminated against, for other employees

on the washer continued to move over to the packing section when there was no work at the washer. Sayre replied, “* * * since you got all involved in the union, I don’t want you in there either. If you wasn’t running around doing things for the union, you’d be down there your right hours just the same as the other girls” (R. 52, 65, 66; 124–125, 129–130).

Luttrell’s participation in the Union’s organizational drive resulted in two more incidents with Santa Clara’s management in 1953. Thus, just before the election, Sayre accused her of removing from the plant bulletin board certain letters posted by Santa Clara in which the Union’s program was opposed (R. 65–66; 130–132). Although Luttrell insisted that she had not taken the letters, both Sayre and plant manager Fuller looked through her purse. The incident ended when they failed to find the letters (*ibid*). Again in December, the day after Luttrell had participated in contract negotiations with Santa Clara as a member of the Union’s committee, Fuller, who also had been at the negotiating session, called her into his office (R. 66; 125). Fuller remarked to Luttrell that he had been notified that she had been elected as chief shop steward, and added that she appeared to be “working under a nervous strain” (R. 66; 126). Continuing, Fuller stated that Luttrell would be able to work “just when the washer was running,” and that “if [she] wanted to go someplace else to work, [she] had [her] choice” (*ibid*). When Luttrell inquired why she couldn’t continue

as she had in past years, Fuller replied, "Well things have changed" (*ibid*).

In February, 1954, Luttrell was assigned permanently to work on the so-called "wet belt," a job performed in a cold and drafty place which was generally regarded as undesirable, and normally given to inexperienced employees (R. 66, 72; 138-139, 310-311). This assignment occurred a few days after Joe Lockner, the washer foreman, told Luttrell that Sayre had instructed him to "eat [her] out" because of allegedly poor work (R. 66; 137). Lockner explained, however, that he knew that "there isn't anything wrong with [her] work," and that the real difficulty was that she was "on the other side" (*ibid*). When the assignment to the wet belt subsequently was made, Lockner told Luttrell that the change of jobs was not his but Sayre's idea, and stated further: "Jewel, you know of the discrimination that has been going on around here and * * * this is it" (R. 66; 138).

C. Santa Clara's refusal to bargain with the Union, and the unilateral wage increases

Following the Union's victory at the polls and its certification on November 13, 1953, as the bargaining representative of Santa Clara's employees, it met with Santa Clara for the first time on December 17, 1953, for the purpose of negotiating a contract (R. 73; 140, 190, 195). The Union presented a proposed contract as a basis for discussion, and the remainder of the meeting was devoted to a reading and explanation of its clauses (R. 73-74; 141-142, 190-191, 196). A sec-

ond meeting was held on January 14, at which time the parties continued to negotiate on the basis of the proposed contract (R. 74; 142, 192, 196-197, 276-277). During the course of this meeting a police officer interrupted negotiations to serve plant manager Fuller with a petition signed by a majority of Santa Clara's employees purporting to repudiate the Union as their bargaining representative (R. 74; 143, 192, 197, 277). Santa Clara's attorney, who attended the meeting, stated that in view of the petition negotiations would be recessed until the circumstances giving rise to it had been investigated (R. 74; 143, 192, 198, 278). The Union's negotiators objected to the recess, stating that the petition could not affect Santa Clara's obligation to meet with the Union, and that in any event negotiations should continue while Santa Clara investigated the petition (R. 74; 192, 197-198). The meeting was nonetheless ended at that time, and, although the Union thereafter requested both verbally and by letter that negotiations be resumed, no further meetings were held (R. 74; 38, 40, 143, 194, 198). On February 26, 1954, Santa Clara, in a letter signed by its attorney, answered the Union's request for further contract negotiations by stating that, as a result of the repudiation petition, "you no longer represent a majority of the employees" (R. 74; 39).

On January 27, 1954, some two weeks after the final meeting with the Union, Santa Clara granted a wage increase of approximately 15%-20%, which was made retroactive to September 1953 (R. 74-75; 166, 207, 288-289, 300-301). This increase followed a meeting between Santa Clara officials and a commit-

tee of employees who had sponsored the petition for revoking the Union's authority as the bargaining representative of the employees, at which time wages were discussed and the amount of the new wage rate was established so as to equalize wages at Santa Clara with prevailing rates at its competitors (R. 74-75; 279-281, 288-293). On April 24, 1954, a further wage increase of 10¢ an hour was given to all employees (R. 75; 208). Santa Clara did not consult or give notice to the Union with respect to either of these increases (R. 75; 300-301). The contract which the Union had proposed at its first meeting with Santa Clara called for an increase in wages, but the parties had not talked about wages at either of their two meetings (R. 75; 194, 265-266, 300).

D. The Union's change of affiliation following Santa Clara's refusal to bargain with it

Throughout the events heretofore described, the Union was chartered directly by the CIO as a local without affiliation with any of the CIO's international unions (R. 47; 199). During this period, however, a committee on jurisdiction within the CIO had recommended that the Union affiliate with the United Packinghouse Workers of America, an international union holding membership in the CIO, which appeared to assert jurisdiction over the same groups of employees as those who belonged to the Union (R. 77; 199-200, 231). Acting upon this proposal, the Union and the Packinghouse Workers met in the spring of 1954 to discuss the matter, and de-

cided to refer the question to the membership of the Union (*ibid*). As a result, membership meetings of the Union were held throughout the area where it operated for the purpose of presenting, discussing and voting on the question of affiliating with the Packinghouse Workers (R. 77; 201, 231-232). Such a meeting was held in March, 1954, in Oxnard, where about 150 members from the various citrus packing houses in the area, including Santa Clara, voted unanimously, following discussion, to accept the proposed affiliation (R. 88; 202-203, 231). The vote for affiliation was also "overwhelmingly" carried in the other meetings which were held, and in consequence the Union turned in its charter to the CIO, which canceled it, and on July 1, 1954, a new charter was issued the Union by the Packinghouse Workers under the name "United Packinghouse Workers of America, Local 78, CIO" (R. 88; 228-229). The officers of the Union at the time of its affiliation with the Packinghouse Workers continued in positions of authority thereafter, and the Union continued without interruption the same operations and administered the same collective bargaining contracts as before (R. 230, 235, 237-238).

On September 7, 1954, the newly chartered Union filed a motion with the Board's regional director, who had conducted the consent election of November 4, 1953, and had thereafter certified the Union as the bargaining representative of Santa Clara's employees, to amend the certification to reflect the change of affiliation (R. 33-34). The regional director issued

an order to show cause with respect to the motion, which was served on Santa Clara, and the latter filed an opposition thereto, alleging that the motion was an attempt "to substitute a new, different and non-certified union in the place and stead of the * * * only union elected by secret ballot" (R. 36-37). Thereafter, on September 21, 1954, the regional director granted the Union's motion and amended the certification to reflect the Union's change in affiliation (R. 88; 42-43).

III. The Board's conclusions

Upon the foregoing facts the Board concluded that Santa Clara had violated Section 8 (a) (1) of the Act by its threats, promises and other coercive conduct with respect to the actions of its employees in supporting the Union's organizational and other activities; that it violated Section 8 (a) (3) of the Act by precluding employee Luttrell, because of her Union activity, from continuing to work in the packing section when the washer was not in operation; and that it violated Section 8 (a) (5) of the Act by breaking off negotiations with the Union because of the petition by which a majority of its employees purported to revoke the Union's bargaining authority, and by unilaterally granting two wage increases. Moreover, the Board concluded that the regional director had not acted arbitrarily in granting the motion to amend the certification to reflect the Union's subsequent affiliation with the Packinghouse Workers. (R. 86-87.)

IV. The Board's Order

The Board's order requires Santa Clara to cease and desist from refusing to bargain with the Union, as now affiliated, from refusing to make work assignments because of union activity, from acting unilaterally with respect to wages, and from making threats or in any other manner interfering with its employees' exercise of their rights to self-organization, to assist unions, to bargain collectively, or to engage in other concerted activities. Affirmatively, the Board's order requires Santa Clara to make employee Luttrell whole for any loss of wages suffered because of the discrimination against her, upon request to bargain with the Union, as now affiliated, and to post appropriate notices. (R. 88-90.)

SUMMARY OF ARGUMENT

I. The evidence amply supports the Board's finding that Santa Clara, through its supervisors, unlawfully interfered with the organizational rights of its employees in opposing unionization by means of threats and promises. Santa Clara's contention that the evidence of such threats and promises is not within the scope of the allegations of the complaint is without merit.

II. There is also ample evidence to support the Board's finding that Santa Clara, because of employee Luttrell's union activities, terminated its practice of assigning Luttrell work in the packing section of the plant when the washer, where she ordinarily worked,

was not operating. Santa Clara's assertion that the foregoing change in Luttrell's work assignments occurred before her participation in the Union's organizational campaign raises only credibility issues which were resolved against it both by the trial examiner and the Board. No convincing reason is advanced for overturning such rulings.

III. By refusing to deal with the Union two months after its certification, on the ground that it allegedly had lost the support of a majority of the employees, and by thereafter granting a wage increase without consulting the Union, Santa Clara violated Section 8 (a) (5) and (1) of the Act. *Brooks v. N. L. R. B.*, 348 U. S. 96.

IV. The Board properly concluded that the Regional Director had not acted arbitrarily in amending the certification of the Union to reflect its affiliation with the Packinghouse Workers following the commission of the unfair labor practices in this case. The Union's identity as the employees' bargaining representative remained substantially the same following its affiliation action; accordingly, the Sixth Circuit's decision in *Dickey v. N. L. R. B.*, 217 F. 2d 652, is distinguishable and not controlling. Judicial authority and practical considerations combine to support the propriety of an amendment to a certification to reflect such an organizational change where, as here, no reasonable doubt exists as to the identity of the organization which is entitled to representation rights.

ARGUMENT

I. Substantial evidence supports the Board's finding that petitioner violated Section 8 (a) (1) of the Act in opposing the organization of its employees by means of threats, promises and other coercive statements

As shown in the Statement, pp. 5-8, *supra*, Santa Clara's foreman, Roger Sayre, threatened to layoff employees who supported the Union and promised to retain those who did not; he made implicit threats of economic reprisal against employees who failed to sign the petition which purported to revoke the Union's representative authority, and stated that but for the Union the employees would have been granted an increase in wages; moreover, he indicated to employee Gomez that his support of the Union had caused him a promotion, and authorized employee Guillen to attempt during working hours to dissuade employees from joining the Union. That such a pattern of coercive opposition to the exercise of the employees' right to organize and assist unions violates Section 8 (a) (1) of the Act is not open to serious question. See, e. g. *N. L. R. B. v. Grand Central Aircraft*, 216 F. 2d 572 (C. A. 9); *N. L. R. B. v. Parma Water Lifter Co.*, 211 F. 2d 258, 261-263 (C. A. 9), certiorari denied 348 U. S. 829; *N. L. R. B. v. Globe Wireless*, 193 F. 2d 749, 751-752 (C. A. 9).

Santa Clara contests neither the Board's conclusion that the foregoing conduct violates the Act, nor the credibility rulings made by the Trial Examiner and affirmed by the Board upon which the Board based its findings. Santa Clara's only contention on this phase of the case is that the threats and promises by which the Board found that Santa Clara deprived its

employees' of their statutory freedom to organize were not within the scope of the allegations of the complaint, and thus were "irrelevant and immaterial to any of the issues in this proceeding" (Br. 33). The short and conclusive answer to this contention is that Santa Clara made no objection at the hearing to the reception of evidence pertaining to this coercive conduct, either on the ground presently asserted or any other ground, and therefore waived its right to have the admissibility of such evidence considered by the Board or this Court. For it is settled law that although testimony may be inadmissible by reason of irrelevancy or other rules of evidence, if it is "received without objection, it [is] entitled to consideration as substantive evidence of the fact asserted." *Continental Oil Co. v. United States*, 184 F. 2d 802, 813 (C. A. 9). See also, Wigmore on Evidence, 3rd Ed., Vol. I, Section 18, pp. 321-322, 328-330. Cf. *N. L. R. B. v. Simpson Casket Co.*, decided January 16, 1956, 37 LRRM 2343, 2344 (C. A. 9).

Moreover, the contention proceeds on an erroneous assumption, for the complaint is plainly broad enough to cover the evidence in question. Thus, the allegation that Santa Clara "restrained and coerced its employees in the exercise of their rights guaranteed by Section 7 of the Act" is not limited, as Santa Clara assumes, to the specific instances stated thereafter, but expressly refers to "various acts and statements including, without limitation, the [specified conduct]" (R. 15-16). Santa Clara does not, and cannot properly, suggest that the threats and promises found by the Board do not fall within the fore-

going language. Cf. *N. L. R. B. v. Thomas Drayage & Rigging Co.*, 206 F. 2d 857, 859–860 (C. A. 9); *N. L. R. B. v. Yale & Towne Mfg. Co.*, 114 F. 2d 376, 379 (C. A. 2). Nor can it be maintained that the quoted allegation of the complaint is improper for lack of specificity, particularly in view of the fact that Santa Clara made no request for a bill of particulars. *N. L. R. B. v. Andrew Jergens*, 175 F. 2d 130, 136 (C. A. 9), certiorari denied, 338 U. S. 827; *N. L. R. B. v. Yale & Towne Mfg. Co.*, *supra*. It should also be noted that at the hearing Santa Clara did not claim surprise, but introduced testimony in an effort to refute the evidence of coercive conduct by its officers (R. 225–226, 239–245, 283–284). Accordingly, since Santa Clara “was afforded full opportunity to justify the action of its officers * * * the matter is not one calling for a reversal.” *N. L. R. B. v. Mackay*, 304 U. S. 333, 350–351.

Finally, even assuming, *arguendo*, that some of the threats and promises shown to have been made by Santa Clara’s officers are not within the complaint, other such proven conduct was specifically alleged.⁵ Santa Clara’s insistence (Br. 34) that the evidence of such conduct does not come within the complaint

⁵ Thus, the evidence shows (*supra*, pp. 5–8, 10–11), as the complaint alleges (R. 16), that Sayre “threatened to fire an employee if he continued to support the Union”; told an employee that a promotion was withheld because the latter supported the Union; stated to employees “that if it had not been for the Union they would be making more money”; threatened employee Luttrell “that if it had not been for the Union [she] would be working full time instead of part time”; and threatened to give job preference in lay offs to union opponents.

because the dates alleged vary as much as a week or so from the dates proven is unavailing. As stated by the Court of Appeals for the Seventh Circuit, "We see no reason why the Board, in its review of the record, should be held to the precise dates alleged in the complaint * * *. It cannot be said that such discrepancy constitutes a variance between the charge and the findings." *Ritzwoller v. N. L. R. B.*, 114 F. 2d 432, 434.

In sum, no persuasive reason is given which refutes the correctness of the Board's finding that Santa Clara coerced its employees in the exercise of their organizational rights.⁶

II. Substantial evidence supports the Board's finding that petitioner refused work assignments to Jewel Luttrell and improperly questioned and threatened her, all because of her Union activities, thereby violating Section 8 (a) (1) and (3) of the Act

It is established law that discrimination in making work assignments to an employee because of support for and membership in a union is violative of Section 8 (a) (3) of the Act. *N. L. R. B. v. Radio Officers Union*, 347 U. S. 17, 26, 42; *N. L. R. B. v. Security Warehouse Co.*, 136 F. 2d 829, 834 (C. A. 9). See also *N. L. R. B. v. Waterman S. S. Corp.*, 309 U. S. 206, 218, 223-214. The Board's finding that Santa Clara so discriminated against Luttrell, by discontinuing its practice, after Luttrell identified herself as a leader of the Union's organizational drive,

⁶ Santa Clara's suggestion (Br. 35) that Sayre's coercive statements were "vague" and "susceptible of multiple interpretations" is decisively negated by an examination of the record references of the Board's findings cited in the statement, *supra*, pp. 5-11.

of assigning her work in the packing section of the plant when there was no work at her normal job on the washer, is abundantly supported by the evidence. Indeed, the Board scarcely could have found otherwise in view of foreman Sayre's statement to Luttrell, when the latter asked why she was no longer permitted to work in the packing section, that "* * * since you got all involved in the union, I don't want you in there either. If you wasn't running around doing things for the union, you'd be down there your right hours just the same as the other girls" (R. 124-125, 129-130).

Both consistent with and corroborative of this finding is the manner in which Luttrell was singled out as a target of much of Sayre's coercive resistance to the Union. Thus, as shown *supra*, pp. 9-11, Sayre interrogated Luttrell to find out what had occurred at the early Union meetings; told her, after she had distributed membership cards in the plant, that he was aware of "who brought them in here" (R. 134); told her that wages would be higher were it not for the advent of the Union; and accused her of taking antiunion notices from the bulletin board. Plant manager Fuller, in addition, invited Luttrell on the day following her participation in contract negotiations with Santa Clara to seek work elsewhere, since she would only be permitted to work at Santa Clara "when the washer was running" (R. 126). And finally, in February 1954, after being subjected to criticism on the pretext of poor work, but actually because she was "on the other side" (R. 137), Luttrell was told by the washer foreman that she was being permanently assigned to a less

desirable job as a result of "this discrimination that has been going on around here * * *" (R. 138). The treatment so accorded Luttrell becomes even more significant when viewed in the light of Luttrell's unquestioned experience in citrus packing plants, her versatility and her acknowledged usefulness to Santa Clara (*supra*, p. 8).

The questioning of and statements to Luttrell, in the context of "a milieu of antiunion activity" as fully described in the Statement, *supra*, not only furnish support for the conclusion that Luttrell was treated discriminatorily with respect to the change in her work assignments, but also independently constitute restraint and coercion in violation of Section 8 (a) (1) of the Act. *N. L. R. B. v. W. T. Grant Co.*, 199 F. 2d 711, 712 (C. A. 9), certiorari denied 344 U. S. 92; and see cases cited *supra*, p. 18. In short, the record clearly shows that Santa Clara deprived Luttrell of the full freedom to participate in the organizational activity which the Act guarantees.

The substance of Santa Clara's defense to the Board's finding that Luttrell was discriminated against is that the practice of assigning her work in the packing section was discontinued in "April 1953, or, at the latest, July 1953," and therefore before Luttrell's union activity had begun (Br. 29, 26-33). This contention raises only a question of credibility of witnesses. For the testimony upon which it is based—that Luttrell did not work during the summer of 1953 in the packing section when the washer was not operating—was rejected by the Trial Examiner

and the Board in favor of testimony found to be credible that the refusal to permit Luttrell to work in the packing section did not occur until after the middle of September (R. 70-71, 87).⁷ As shown *supra*, pp. 9-10, Luttrell's participation in the Union's organizational drive, with which Sayre was fully acquainted, began in August. Moreover, Santa Clara's argument is contrary to Sayre's statement to Luttrell, credited by the Board, that she was deprived of the packing section work because she "got all involved in the union" (*supra*, p. 10). As this Court has recently had occasion to reiterate, such "questions of credibility * * * are for the examiner and the Board, not for [the court], to resolve" *N. L. R. B. v. Wagner*, 227 F. 2d 200, 201. Santa Clara suggests no reason for upsetting the Board's credibility determinations.⁸ Accordingly, the Board's order with respect to Luttrell should be enforced.

⁷ Santa Clara makes no mention in its brief of the alleged evidence which it sought to have introduced into the record by its motion of October 6, 1955, to this Court for leave to adduce additional evidence, and by which it sought to show that Luttrell did not work in the packing section in the summer of 1953. In view of the Court's denial of Santa Clara's motion from the bench during the hearing thereon, on October 31, 1955, we assume that it has abandoned reliance on such evidence. If this assumption is incorrect, however, we respectfully refer the Court to the Board's opposition to Santa Clara's motion, filed October 21, 1955, for a full statement of the reasons why such evidence should not be considered, or, if considered, why it does not support Santa Clara's contention with respect to employee Luttrell.

⁸ Santa Clara's interpretation of Luttrell's testimony to be that "since * * * July, 1953, she did grading in the packing section only one day which was September 16, 1953" (Br. 27) is not an accurate account of what the record shows. After referring to the one day in September when she worked in the packing sec-

III. The Board properly found that petitioner's refusal to bargain with the Union and its unilateral action in increasing wages violated Section 8 (a) (5) of the Act

Santa Clara does not contest the Board's finding that it committed an unfair labor practice by breaking off negotiations with the Union and refusing to meet with it further upon receipt, only a few months after the certification had issued, of the petition by which a majority of the employees purported to revoke the authority of the Union to represent them.⁹ In view of the controlling Supreme Court decision in *Ray Brooks v. N. L. R. B.*, 348 U. S. 96, affirming this Court's decision in 204 F. 2d 899, the Board's determination in this respect is not open to challenge.

However, Santa Clara does attempt to defend its action in thereafter increasing wages without notifying or consulting the Union on the ground that while the question of the propriety of breaking off negotiations was being adjudicated bargaining was in effect "suspended." (B. R. 25). The "suspension" of negotiations was not the result of a *bona fide* impasse in bargaining but of Santa Clara's unlawful refusal

tion, which reference Santa Clara abstracts from the context of her testimony, Luttrell made clear that this was but one of "between six and ten days" when she worked there during this period (*infra*, p. 42). Luttrell confirmed this statement elsewhere in her testimony (R. 123, 124).

⁹ Santa Clara's contention, discussed *infra*, pp. 26-37, that the Board erred in requiring it to bargain with the Union as presently affiliated, has bearing only upon the appropriateness of the Board's bargaining order, and not on the separate question of whether Santa Clara's refusal to meet with the Union on and after January 14, 1954, was violative of Section 8 (a) (5). The change of affiliation did not take place until long after Santa Clara's refusal, and of course, was not the reason for it.

to deal with the Union because of the employees' revocation petition. In these circumstances, even if it be assumed that the Union was not consulted because Santa Clara believed it had no obligation to deal with the Union, and because an increase was necessary "to meet competitive wage rates" (Br. 26), it is settled law that Santa Clara's unilateral action constituted an unfair labor practice. *May Department Stores Co. v. N. L. R. B.*, 326 U. S. 376, 381-386.¹⁰

IV. The Board properly affirmed the Regional Director's order amending the Union's certification to reflect its change of affiliation, and therefore correctly ordered petitioner to bargain with the Union as so affiliated

In requiring Santa Clara to bargain with United Packinghouse Workers of America, Local 78, CIO, the Board's order takes into account the fact that the Union, as shown in the statement, *supra*, pp. 13-15, affiliated with the Packinghouse Workers several months following the unfair labor practices in this case, and that the Board's Regional Director amended the certification of the Union to reflect this change. This amendment was made upon the Union's motion, which set forth the facts pertaining to the change of affiliation, and pursuant to the authority vested in the

¹⁰ The two Board decisions (*Montgomery Ward & Co.*, 39 N. L. R. B. 229, and *Westchester Newspapers, Inc.*, 26 N. L. R. B. 630) relied on by Santa Clara (Br. 25) deal with unilateral wage action by employers at a time when negotiations were suspended because of a *bona fide* bargaining impasse. They have no relevancy here, where the employer unlawfully broke off negotiations before, and without respect to whether, the parties had exhausted the possibilities of reaching agreement.

Regional Director by the consent election agreement under which the election was held and the certification of the Union was issued. That agreement, executed by Santa Clara and the Union, provided, *inter alia*, "that [the Regional Director's] rulings or determinations in respect of any amendment of any certification resulting [from the election] shall also be final" (R. 1).

In opposing the amendment of the certification, Santa Clara argues that the newly affiliated union is "different from the one elected by the employees" and therefore cannot replace, as the certified representative of its employees, the organization selected at the Board-conducted election (Br. 17). In support of its argument, Santa Clara relies on the decision of the Sixth Circuit in *Dickey v. N. L. R. B.*, 217 F. 2d 652. The Court held that in the circumstances of that case a certification could not be amended to run in favor of a labor organization created out of a merger between the union chosen by the employees and another union. The Sixth Circuit reasoned that where there are substantial differences between the union chosen by the employees and a union which makes a successorship claim to representation rights, a substitution of the latter for the former in an existing certification would be in derogation of the Act's provisions pursuant to which representation rights are established. The opinion points out that as a result of the merger involved in the *Dickey* case, the management of the new organization was vested so heavily in the officers of the noncertified union that the union chosen by the

employees “had no control of the amalgamated union”; moreover, the members of the certified union composed “a fraction only, although a substantial fraction, of the resulting membership in the [amalgamated union].” 217 F. 2d at 655. From these circumstances the Court concluded that the new organization resulting from the merger was “a union different from the one actually chosen by the men and certified,” and therefore that the employer was under no obligation to bargain with the new union. 217 F. 2d at 654.

It may be assumed *arguendo* that substantial alterations, such as those involved in the *Dickey* case, in the control and composition of a certified union may produce a union substantially different from that originally selected by employees, and therefore one which should not succeed to bargaining rights without establishing its majority in appropriate representation proceedings. It does not follow, however, that such a succession to bargaining rights by a union which is substantially identical with a certified union is improper. Indeed, in basing its ruling on the important differences between the status of the union as originally certified and its status after it had merged with a larger union, the Sixth Circuit in the *Dickey* case implicitly so recognizes.

Apparently conceding that the Regional Director could properly amend the certification to reflect the Union’s change in affiliation if no substantial alteration was affected thereby in the Union as a bargaining representative, Santa Clara argues that there are such

substantial differences. In view of the consent election agreement in which all parties agreed that the Regional Director's determination "in respect of any amendment of [the] certification * * * shall be final," Santa Clara must show not merely that there is support in the record for its position, but more, that there is no rational basis in the evidence upon which the Regional Director could reject its contention. See *N. L. R. B. v. Carlton Wood Products*, 201 F. 2d 863, 866 (C. A. 9). This it cannot do, for as we now show, the record amply supports the conclusion of the Board "that the Regional Director did not act arbitrarily or capriciously" (R. 88).

The organizational change within the Union was in the main a formal one, effected for administrative purposes within the CIO, and thus involved little more than issuance of a charter by an international union affiliated with the CIO rather than by the CIO directly. Contrary to Santa Clara's assertion that "a minority group of union members" was responsible for the change of affiliation (Br. 10), the record makes plain that it came about when the CIO committee on jurisdiction recommended affiliation in order to bring similar classes of employees within one of its member organizations (*supra*, pp. 13-14). Action on this recommendation resulted only after widespread meetings showed that affiliation with the Packinghouse Workers was "overwhelmingly" supported by the membership (*supra*, p. 14).

Significantly, the change of affiliation was in no way attributable to a schismatic development among

the employees, a jurisdictional raid by another union, or, indeed, to any dissatisfaction with the Union's leadership or policies. For this reason, there is no pertinency in the Board decisions cited by Santa Clara (Br. 22-23) in which the Board ruled that a new representation election rather than an amendment to an existing certification was appropriate to determine whether representation rights might be exercised by an organization to whom a substantial number of the employees had transferred their allegiance. In such cases, unlike here, a "doubt [had risen] as to the identity of the bargaining representative," either because the union originally certified claimed that it, and not the union seeking the amendment, was entitled to recognition as the bargaining representative, or because of similar unresolved and conflicting claims. *Carson Pirie Scott & Co.*, 69 N. L. R. B. 935, 938.¹¹ Accordingly, in those circumstances there was, within the meaning of Section 9 (c) (1) of the Act, "a question of representation" which must be resolved by a Board election. No doubt whatsoever as to succession of bargaining rights existed in this case. That the affiliation action entitled the Union as affiliated with the Packinghouse Workers to exercise the rights it held under the certification before affiliation was contested neither by employees nor by any organization. The only employee opposition to the right of the Union to bargain with Santa Clara after

¹¹ See also the following recent cases: *Hollingshead Corp.*, 111 N. L. R. B. 840; *Gulf Oil Co.*, 109 N. L. R. B. 861; *Weatherhead Co.*, 106 N. L. R. B. 1266.

its affiliation was raised by the so-called "Employees' Committee." This group, however, made clear both in the petition it served on Santa Clara (*supra*, p. 12), and in the hearing before the Trial Examiner that it did not contest the legitimacy of the affiliation action, or the substantial identity between the Union before and after affiliation, but rather it contested the right of the Union, irrespective of its affiliation, to represent the employees following the alleged loss of majority employee support. (See R. 23-31.) As we have shown (*supra*, p. 25) the attempt to abrogate bargaining rights on this ground is unavailing; accordingly, it has no legal bearing upon the succession of bargaining rights.

Consistent with the formal character of the change in affiliation, as above described, the Union remained the same in all material respects. There was no dilution of membership as in the *Dickey* case; indeed, the composition of the Union remained unchanged. If Santa Clara means to challenge this fact by its assertion (Br. 16) that control of the Union "was arbitrarily taken over by the 150,000 member Meatpackers International from the 18,000-member Fruit & Vegetable Union," it wholly misconstrues the effect of the amendment to the certification. The amended certification does not run in favor of the Packinghouse Workers International—the 150,000 member organization—but rather in favor of Local 78 of the Packinghouse Workers—the same 18,000-member union originally certified but for its change in name. Thus, the shift in control of the certified

union in the *Dickey* case that resulted from its merger with the numerically larger union, a consideration heavily relied on by the Sixth Circuit, is not present in this case.

Also in contrast to the facts in *Dickey*, the officers of the Union in this case retained authority following affiliation with the Packinghouse Workers,¹² and since no merger was involved, there was no problem of allocating additional offices to officials from a different union. The change of affiliation, moreover, altered neither the capacity nor the performance of the Union with respect to its status as bargaining representative of Santa Clara's employees.¹³ Indeed, employers with whom the Union dealt generally accepted the fact of affiliation, substituted the new name for the old in

¹² The uncontradicted testimony of two witnesses in the record of this case, not mentioned by Santa Clara in its assertion that the Union's "officers were removed" upon its affiliation with the Packinghouse Workers (Br. 15), was that the same Union officers continued in office after the affiliation occurred (R. 230, 235, 237-238). As Santa Clara points out, however, the record in the *Carpenteria* case, No. 14823, contains somewhat differing testimony. That testimony, however, is not that the "officers were removed" (Br. 15), but rather that they took on different positions of authority in the Union following the affiliation action (No. 14823, R. 117-120). The record contains no explanation for this difference in testimony but in any event the differences are immaterial, for it is clear that the elected officers retained positions of authority, and were not replaced by officers not elected by the membership (*ibid.*).

¹³ Santa Clara's emphasis of the fact that the Union's affairs were handled by an administrator following its affiliation with the Packinghouse Workers (Br. 6-7, 15-16, 21) is unavailing. Since the Union was in administration under the CIO as well (R. 227, 230, 235), this circumstance shows neither that the Union had undergone substantial structural changes nor that its ability to function as a bargaining representative had been impaired.

their contracts with the Union, and continued bargaining relationships without interruption (R. 237). In sum, the Union in whose favor the certification and order in this case now runs is in all substantial respects the same organization as that chosen by the employees at the election of November 4, 1953.

The Board's conclusion that an amendment could properly be made in the certification of the Union to reflect its change of affiliation is judicially supported in cases approving bargaining orders which take into account such changes occurring after commission of the unfair labor practice. These cases show that a change of affiliation, standing alone, does not effect so basic a change in the identity of a union as to render it a new and different organization from that originally selected by the employees. Thus, even in the more extreme situation where a union switches its affiliation from the AFL to the CIO, but where "there was no change in officers or central offices; the change was only in name; and continuity of organization was preserved. * * * There was no such disruption or change of identity as to affect in any manner the validity of the parts of the order requiring [the employer] to bargain collectively with the union." *Continental Oil Co. v. N. L. R. B.*, 113 F. 2d 473 (C. A. 10), certiorari denied on this point 311 U. S. 637, 313 U. S. 212. Similarly, the Court of Appeals for the Fourth Circuit upon the same factual pattern, upheld the propriety of a bargaining order which ran to a union as newly affiliated, explaining (*N. L. R. B. v. Harris-Woodson Co.*, 179 F. 2d 720, 723):¹⁴

¹⁴ Cf. *N. L. R. B. v. E. A. Laboratories, Inc.*, 188 F. 2d 885, 888 (C. A. 2), certiorari denied 342 U. S. 871.

It was the local union which the employees chose as their bargaining representative; and the fact that they desired it to represent them in collective bargaining was not affected by its change either of name or affiliations. * * * Metaphysical arguments as to the nature of the entity with which we are dealing should not be permitted to obscure the substance of what has been done or to furnish a smoke screen behind which the company may with impunity defy the requirements of the statute that it bargain with the representative that its employees have chosen. The identity of that representative, composed entirely of the company's employees, was not changed either by its change of name or its change of affiliation.

In other situations not involving the Act, courts have also held that the identity of a local union is not necessarily lost by a change of affiliation. See, e. g., *Labonite v. Cannery Workers Union*, 197 Wash. 543, 86 P. 2d 189, 191; *Jenkins v. Local 6313, C. W. A.*, 271 S. W. 2d 71, 84 (C. A. Mo.); *World Trading Corp. v. Kolchin*, 166 Misc. 854, 2 N. Y. S. (2d) 195 (N. Y. Sup. Ct.). In all such cases, as here, this conclusion follows from and is in full accord with the commonly understood meaning of "affiliation;" thus, the term denotes "association with" or "joining with,"¹⁵ and implies that the entity which "affiliates"

¹⁵ "Affiliate" is defined as "To receive or place on friendly terms; associate with; join usually reflexively or passively, followed by *to* or *with*; as to *affiliate* oneself with (or to) a political party; he *was affiliated with* good men." *New Standard Dictionary of the English Language*, Funk & Wagnalls Co. (1937).

does not become identical with that with which "affiliation" is effected, but retains its individual character and identity.

Recognition of the fact that a union which changes affiliation does not thereby necessarily become a different union is of special importance in cases, like this one, which involve the continuity of a bargaining relationship. For it is a well known phenomenon in employee organizations that changes of affiliation and other modifications of an organizational type frequently occur.¹⁶ The desire to align one's organization with a group which offers more advantages, dissatisfaction with policies or leadership in an existing international union, or, as here, a purpose of avoiding jurisdictional conflicts are some of the many stimuli which prompt unions through their membership to take affiliation or disaffiliation action. These experiences, however, are external to the bargaining function of a union, and if collective bargaining is to enjoy the stability it must have to achieve the objectives of the Act, such organizational vicissitudes cannot be permitted to interrupt the continuity of an established bargaining relationship, at least where, as here, the essential identity of the union remains unchanged.

It should be noted, moreover, that the governing charters, constitutions and bylaws of unions invariably make provision for changes of affiliation, and, accord-

¹⁶ Notations of such organizational changes may be found from time to time in the Monthly Labor Review (Bur. of Labor Stat.). See, e. g., Vol. 78, pp. 934-935 (August 1955), and p. 579; Vol. 76, p. 640 (June 1953); Vol. 69, pp. 240-241 (Sept. 1949); Vol. 68, p. 148 (February 1949).

ingly, employees who join unions are ordinarily held to be bound by whatever changes of affiliation may occur consistent with such rules. As stated by this Court, "when a man joins a labor union (or almost any other democratically controlled group), necessarily a portion of his individual freedom is surrendered for the benefit of all members. He accepts the will of the majority of the members in order that he may derive the advantages to be gained from the concerted action of all." *Dyer v. Occidental Life Insurance Co.*, 182 F. 2d 127, 130 (C. A. 9). See also, *Talton v. Behncke*, 199 F. 2d 471, 473 (C. A. 7). Thus, from the standpoint of protection given by the Act to employees to be represented by a union of their choice, a change of affiliation within the same parent body, as here, cannot be regarded as affecting the right of the union, which the employees joined and designated as their representative, to continue to exercise the rights of its certification. In this respect it is significant that in the proviso to Section 8 (b) (1) (A) Congress specifically stated that a union's right to prescribe its own rules on admission to and retention of membership in a union was to remain unimpaired, notwithstanding the Act's assurance to employees that their Section 7 rights could be enjoyed free of restraint and coercion by unions, and the restrictions which the Act placed on compulsory union membership. See Legislative History, Vol. II, pp. 1097, 1139-1143. We submit that

a change of affiliation which, like the one in this case did not substantially alter the identity of the Union, may be deemed to fall into the class of internal union affairs which Congress concluded should have no impact on the rights and duties provided in the Act.

In sum, all the relevant considerations weigh heavily in favor of the validity of the amendment made to the certification of the Union in this case. Collective bargaining cannot succeed without some stability in the employer-union relationship, and stability cannot be attained if continuity in bargaining relationships is in jeopardy whenever a union undergoes a change in affiliation—not an infrequent occurrence. While the Act protects employees against representation by a union other than the one of their choice, that consideration is not material where, as here, a change of affiliation does not change the identity of the union and, moreover, there is no employee opposition to the change and no conflicting claims with respect thereto. Nor, in any event, is that consideration one which, in deciding whether a bargaining relationship shall continue, may be treated separately from the policy favoring continuity in collective bargaining. The decision of the Board in this case properly furthers the practice of collective bargaining by Santa Clara with a union which in all material respects is identical with that originally designated by the employees.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Board's order should be enforced in full.

THEOPHIL C. KAMMHOLZ,
General Counsel,

DAVID P. FINDLING,
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Assistant General Counsel,

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FEBRUARY 1956.

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the

Nos. 14,823, 14,824, 14,838, 14,839, 14,840

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 14,823.

CARPINTERIA LEMON ASSOCIATION, a corporation, *Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent,*

and

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

vs.

CARPINTERIA LEMON ASSOCIATION, a corporation, *Respondent.*

No. 14,824.

SEABOARD LEMON ASSOCIATION, a corporation, *Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent,*

and

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

vs.

SEABOARD LEMON ASSOCIATION, a corporation, *Respondent.*

(Over)

Certificate of Counsel in Support of Petition for Re-hearing.

IVAN G. MCDANIEL,

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621 South Hope Street,

Los Angeles 17, California,

Attorneys for Petitioners.

FILED

JAN - 9 1957

J. P. O'BRIEN, CLERK

No. 14,838.
OXNARD CITRUS ASSOCIATION, *et al.*,
vs.
NATIONAL LABOR RELATIONS BOARD,
and
NATIONAL LABOR RELATIONS BOARD,
vs.
OXNARD CITRUS ASSOCIATION, *et al.*,

Petitioners,
Respondent,
Petitioner,
Respondents.

No. 14,839.
SOMIS LEMON ASSOCIATION, a corporation,
vs.
NATIONAL LABOR RELATIONS BOARD,
and
NATIONAL LABOR RELATIONS BOARD,
vs.
SOMIS LEMON ASSOCIATION, a corporation,

Petitioner,
Respondent,
Petitioner,
Respondent.

No. 14,840.
Dec. 11, 1956.
SANTA CLARA LEMON ASSOCIATION, a corporation,
vs.
NATIONAL LABOR RELATIONS BOARD,
and
NATIONAL LABOR RELATIONS BOARD,
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SANTA CLARA LEMON ASSOCIATION, a corporation,

Petitioner,
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and	
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<i>vs.</i>	
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<i>vs.</i>	
SANTA CLARA LEMON ASSOCIATION, a corporation,	<i>Respondent.</i>

Certificate of Counsel in Support of Petition for Rehearing.

LEON L. GORDON hereby certifies and represents unto the Court:

1. That he is a member of the State Bar of California, is admitted to practice before the United States Court of Appeals for the Ninth Circuit, is associated with Ivan G. McDaniel in the practice of law and that they maintain offices at 1020 Pacific Finance Building, 621 South Hope Street, Los Angeles 17, California;

2. That he and the said Ivan G. McDaniel represent the petitioners, CARPINTERIA LEMON ASSOCIATION, SEABOARD LEMON ASSOCIATION, OXNARD CITRUS ASSOCIATION, SOMIS LEMON ASSOCIATION and SANTA CLARA LEMON ASSOCIATION;

3. That he has filed a Petition on behalf of the said petitioners for a rehearing in the above entitled cases; that the said Petition is based upon extensive study and research on the questions involved in the Court's decision; that in his judgment the petition is well founded and further, that it is not interposed for the purpose of delaying the final disposition of the said cases.

DATED: January 8, 1957.

LEON L. GORDON

Nos. 14,823, 14,824, 14,838, 14,839, 14,840

IN THE
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(Over)

PETITION FOR REHEARING.

FILED

JAN - 9 1957

PAUL P. O'BRIEN, CLERK

IVAN G. McDANIEL,
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621 South Hope Street,
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Attorneys for Petitioners.

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PETITION FOR REHEARING.

*To the Honorable William Healy and James Alger Fee,
Circuit Judges, and Gus J. Solomon, District Judge:*

Petitioners, CARPINTERIA LEMON ASSOCIATION, SEABOARD LEMON ASSOCIATION, OXNARD CITRUS ASSOCIATION, SOMIS LEMON ASSOCIATION and SANTA CLARA LEMON ASSOCIATION, respectfully file this Petition for Rehearing and represent unto the Court as follows:

I.

The petitioners filed a Petition for Review of the Orders of the National Labor Relations Board in the above entitled cases on or about July 21, 1955.

II.

The said cases were argued before this Honorable Court at Los Angeles, California, on or about April 6, 1956.

III.

The majority opinion upholding the Orders of the National Labor Relations Board and the dissenting opinion were filed on December 11, 1956.

IV.

The paramount question involved in all five of these cases was whether the United Packinghouse Workers of America Local 78 was substantially the same union as the United Fresh Fruit and Vegetable Union, LIU No. 78, CIO, or whether it was an entirely different entity from that which was certified as the bargaining agent following the consent election.

V.

In dealing with this question the majority opinion states:

“This factual issue was contested before the Trial Examiner who heard the charges against the associations.

* * * * *

“The Board adopted the Trial Examiner’s finding that there was merely a change of name and affiliation. From our consideration of the record as a whole, we find that this determination is supported by substantial evidence. We are precluded by law from re-examining any Board finding of fact in an unfair labor practice case which is so supported. . . .”

VI.

The petitioners respectfully request that a rehearing of all five cases be granted for the following reasons:

(a) The Order of the Regional Director of the National Labor Relations Board amending the certificate by substituting the United Packinghouse Workers of America, Local 78, as the bargaining agent of petitioners’ employees was issued September 21, 1954. The five cases were heard by the Trial Examiner of the National Labor Relations Board prior to November 19, 1954. The decision in the case of *Dickey v. National Labor Relations Board*, 217 F. 2d 652, was handed down on December

16, 1954, after the amendment of the certificate and after the hearing before the Trial Examiner. That case involved the same identical question of law and it presented a strikingly similar fact situation.

Petitioners contend that the law enunciated by the *Dickey* case is controlling in the five cases here before the Court. The *Dickey* case shows clearly the circumstances under which a certificate can be amended to reflect a change in affiliation.

At the time he ordered the amendment to the certificate the Regional Director did not have knowledge of the decision in the *Dickey* case, nor did the Trial Examiner have this decision as a guide at the time of the hearing conducted by him. Consequently neither was the Regional Director nor the Trial Examiner able to consider the factual situation here involved in the light of the *Dickey* case nor was he able to apply the law enunciated by the *Dickey* case, which is clearly applicable to the facts of these five cases. Therefore, petitioners respectfully submit that inasmuch as the decision of the Trial Examiner, subsequently approved by the Board, was prior to the decision in the *Dickey* case, the Court should consider more fully the decision of the Board rather than rely upon its findings which clearly are not in accord with the decision in the *Dickey* case.

(b) Petitioners further contend that the question before the Court, namely, whether or not the United Packinghouse Workers of America, Local 78, is substantially the same union as the union voted for in the consent election, is a question of law and not a question of fact.

In considering this point the majority opinion states:

“The Board adopted the Trial Examiner’s finding that there was merely a change of name and affilia-

tion. From our consideration of the record as a whole, we find that this determination is supported by substantial evidence.”

It is conceded that there was a change of name and a change of affiliation and that the trial Examiner’s finding of facts as regards these two matters, is correct. However, this does not resolve the legal question of whether or not the United Packinghouse Workers of America, Local 78, is the same union as the union voted for in the consent election in view of all the other facts and circumstances of the case.

The Trial Examiner’s finding that there was only a change of name and a change of affiliation indicates that he has ignored or overlooked all the other undisputed facts relating to the transfer of the defunct United Fresh Fruit and Vegetable Union, Local 78, from an Administrator appointed by the CIO to an Administrator appointed by and controlled by the United Packinghouse Workers of America International. It also indicates that he has ignored the undisputed fact that the Administrator appointed and controlled by the United Packinghouse Workers of America International, and deriving his power and authority solely from the International, was in complete and absolute control of the new union. These facts were undisputed but the Trial Examiner resolved the question of law involved by simply finding as a fact that there was only a change of name and a change of affiliation.

Petitioners contend that the findings of fact as to the change of name and affiliation, while correct as far as they go, fail to cover the other important facts of the case upon which the conclusion of law must be based.

Petitioners contend that if it is concluded, as a matter of law, that the United Packinghouse Workers of America, Local 78, is the same union as that voted for in the consent election, then this conclusion of law is contrary to the law enunciated in the *Dickey* case and it is respectfully submitted that the Court erred in holding that it is precluded from examining this because it is a finding of fact and because it is supported by substantial evidence.

(c) Petitioners further submit that the substantial evidence test enunciated in the case of *Universal Camera Corporation v. National Labor Relations Board*, 340 U. S. 474, has no application to the case at hand because here we are dealing with a question of law and not a question of fact.

VII.

This Petition is filed in accordance with the provisions of Rule 23 of the Rules of the United States Court of Appeals for the Ninth Circuit.

WHEREFORE, the said petitioners pray that a rehearing be granted in all of the above-entitled cases.

Dated: January 8, 1957.

IVAN G. McDANIEL,

LEON L. GORDON,

By LEON L. GORDON,

Attorneys for Petitioners.

